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SUPREME COURT NUMBER _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER, 1981 TERM

DANIEL P. O'LEARY,

Petitioner - Appellant,

V.

STATE OF ALABAMA,

Respondent - Appellee,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

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A. QUESTIONS PRESENTED FOR REVIEW:

1. Whether the State Court erred in upholding an exploratory warrantless search of a berthed sailboat and an anchored motor vessel located one mile apart in state waters where the County Deputies who were in charge of the surveillance and ordered the boardings admitted the absence of probable cause or other recognized exception and where members of the boarding party included U. S. Customs Officers who acknowledged during a Hearing on Motion to Suppress that they had no reason to board the vessels at all, save for the specific command of a Baldwin County Deputy who admitted that the Deputies' own purpose for searching the vessel was to conduct an "exploratory search" for "contraband" and where the Customs Officers later, at trial, asserted blanket authority pursuant to 19 U.S.C. Section 1581(a) for boarding the vessels.

2. Whether 19 U.S.C. Section 1581(a) is unconstitutional.

3. Whether the State Court erred in refusing to follow the mandate of the recent companion Supreme Court decisions of United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L.Ed.2d, 619 (1980) and Rawlings v. Kentucky, 448 U. S. 98 100 S. Ct. 2556, 65 L.Ed.2d, 633 (1980), requiring the reversal and remand of proceedings where a defendant relied upon the now overruled "Automatic Standing Rule" for the purpose of affording the defendant an opportunity to demonstrate that his own Fourth Amendment rights were violated, where the record demonstrates that the defendant relied upon "automatic standing" during the Trial Court hearings and on appeal prior to the decisions in Salvucci and Rawlings, Id., but advised the Appellate Court of a change in the law requiring reversal and remand subsequent to the companion decisions of The United States Supreme Court.

4. Whether the State Court erred in refusing to grant Petitioner's Motion to

Quash Grand Jury Venire and Petitioner's Motion to Quash the Petit Jury Venire for the trial set on July 31, 1978, or, in the alternative, to continue the trial setting where a new jury act (Act Number 594, Code of Alabama 1975, 12-16-1, et seq.(Pocket Part)) had been adopted and became effective on April 27, 1978; where the new jury act was adopted for the declared policy that "all persons selected for jury service be selected at random from a fair cross section of the population of the area served"; where evidence adduced at a hearing on the Motion to Quash or in the Alternative Continue held on July 24, 1978, demonstrated that the old jury law containing exemptions from jury service was repealed, that the provisions of the new jury act completely revitalized procedures to be followed in a manner similar to that followed in Federal Court, and where officials of the jury commission testified that full compliance with the new jury act

could be expected within a mere three months time.

B. PARTIES TO THE PROCEEDING:

The named parties are Daniel P. O'Leary and the State of Alabama; however, the constitutionality of an Act of Congress (19 U.S.C. 1581(a)) has been drawn in question and 28 U.S.C. 2403(a) may be applicable, and the Solicitor General's Office has been served with a copy of this petition. The Office of the Solicitor General has been served with a copy of this petition, pursuant to Rule 28 Supreme Court Rules, by mailing a copy to the Solicitor General, Department of Justice, Washington, D.C. 20530.

C. TABLE OF CONTENTS AND TABLE OF CASES AND STATUTES

I. TABLE OF CONTENTS

	Page
A. Questions Presented for Review	1
B. Parties to the Proceeding	4
C. Table of Contents and Table of Cases and Statutes	5-8
D. Reports of Opinions Delivered Below	9
E. Jurisdiction of this Court	9
F. Constitutional Provisions and Statutes Involved	10
G. Statement of the Case	11
1-2. Unconstitutional Search and Seizure and Unlawful Arrest	11
3. Reversal of Automatic Standing Rule	20
4. Jury Issues	22
H. Stage at Which Issues Were Raised	27
I. Argument	29
1-2. Unconstitutional Search and Seizure and Unlawful Arrest	29
3. Reversal of Automatic Standing Rule	31
4. Jury Issues	32

J. Recent Decision Granting Writ of Certiorari in Related Case 34

Certificate of Applicability 35

Certificate of Filing of Brief 36

Certificate of Service of Brief 36

II. TABLE OF CASES

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 695 (1960) 20

O'Leary v. State, ___So.2d ___ (Ct. of Criminal Appeals, May 6, 1980), reversed ___ So.2d ____ (Ala.S.Ct., January 9, 1981), on remand ____ So.2d ___ (Ct. of Criminal Appeals, June 23, 1981), affirmed ___ So.2d ___ (Ala.S.Ct., May 21, 1982), rehearing denied ____ So.2d ___ (Ala.S.Ct., July 16, 1982) 9,21

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) 2,20,31

State v. O'Leary, ___So.2d ___ (Ala.S.Ct., May 21, 1982),p.8 21

United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) 31

United States v. Jones, 528 Fd.2d 303,304 (9th Cir. 1975) 31

United States v. Molina-Garcia, 634 F.2d 217,218, Note 1 (5th Cir. 1981) 32

United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) 2,20, 21,31

United States v. Villamonte-Marquez, 652 F.2d 481 (5th Cir.1981), rehearing En.Banc. denied 651 F.2d 577 (5th Cir.1981), Petition for Cert. granted, ___ U.S. Law Week (June 7, 1982) 30,34

II. TABLE OF STATUTES

A. Amendments IV,V,VI,XIV to the United States Constitution 10

B. 19 U.S.C. 1581 10,11

C. 19 U.S.C. 1581(a) 1,4

D. 28 U.S.C. 2403(a) 4

E. 28 U.S.C. 1257 10

F. Rule 17 of the Supreme Court Rules 10

G. Act No. 594, Code of Ala. 1975, 12-26-1, et seq. (Pocket Part) 3,10,26

H. Code of Alabama 1975, Section:

1.	12-16-1, et seq.	22
2.	12-16-2	25
3.	12-16-39	23
4.	12-16-41	23
5.	12-16-42	23
6.	12-16-45	24
7.	12-16-46	24
8.	12-16-70	24
9.	12-16-74	24
10.	12-16-75	24

D. REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW:

The reports delivered in the Courts below have not yet been officially reported. The following opinions have been rendered:

O'Leary v. State, ___ So.2d____(Ct. of Criminal Appeals, May 6, 1980), reversed ___ So. 2d_____ (Ala.S.Ct., January 9, 1981), on remand ___ Sc. 2d ____ (Ct. of Criminal Appeals, June 23, 1981), affirmed ____ So. 2d _____ (Ala.S.Ct., May 21, 1982), rehearing denied ___ So. 2d ___ (Ala.S. Ct., July 16, 1982).

All opinions have been included in an appendix, with the exception of the decisions rendered May 6, 1980, and January 9, 1981, which dealt with an issue not involved in this petition.

E. JURISDICTION OF THIS COURT:

The final decision of the Alabama Supreme Court was rendered on May 21, 1982. Application for Rehearing was overruled on July 16, 1982, and an Order granting a Stay of Judgment and Extension of Time to Petition for Writ of Certiorari was entered

by the Court of Criminal Appeals on August 2, 1982.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 and Rule 17 of the Supreme Court Rules. Petitioner asserts the State Court has decided an important question of Federal Law which has not been, but should be, settled by this Court and that the State Court has decided Federal questions in a way in conflict with applicable decisions of this Court and the Fifth Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS AND STATUTES:

The Constitutional provisions and statutes involved are cited below. The pertinent text is set forth in the appendix.

1-4. Amendments IV, V, VI, XIV to the Constitution of the United States.

5. 19 U.S.C., Section 1581: Boarding vessels

6. Act. No. 594, Code of Ala. 1975, 12-16-2 (Pocket Part).

G. STATEMENT OF THE CASE:

1-2. UNCONSTITUTIONAL SEARCH AND SEIZURE AND UNLAWFUL ARREST:

Petitioner was arrested at 7:00 a.m., on the morning of December 31, 1977, while aboard a forty foot (40') motor vessel, the "Island Girl", while that vessel was at rest in state waters near Bear Point Marina located near Gulf Shores, Alabama. After Petitioner's arrest, a sailing vessel located one (1) mile distant was boarded and an exploratory search was conducted. The sailboat was berthed against the bank, had no occupants on board, and was also located in state waters.

On appeal, the State has not contended that the exploratory, warrantless searches were in any way based on "probable cause" or any other recognized exception, but instead the state's briefs and the appellate opinions have referred exclusively to the provisions of 19 U.S.C. 1581. The applicability and constitutionality of the provision have been challenged.

Baldwin County Deputies who initiated and were in charge of the surveillance at all times observed the motor vessel, "Island Girl" leaving Bear Point Marina, located ten (10) miles east of Gulf Shores, Alabama, at approximately 9:30 p.m., December 30, 1977, proceeding west toward Fort Morgan, with its normal red and green running lights on through the Intercoastal Waterway (ICW), a series of many bays, inlets, and other waterways, interconnected at times with manmade dredged channels, including an east-west channel across Mobile Bay. (Supp.Tr."A" 205, 212).

Baldwin County officials ordered State ABC Agent, Aubrey Little (Public Safety) and Customs Officer, Joe McKnight, to board a small fishing boat and follow the running lights of the "Island Girl" and monitor the course of the vessel through the ICW. The vessel reached a point in the channel in Mobile Bay north of Fort Morgan and came to rest. (Supp. Tr."A" 7, 212).

Later, ABC Agent, Little, and Customs Officer, McKnight, were instructed to transfer to a custom vessel located two (2) miles further to the west of the "Island Girl" in the ICW and began monitoring positions by radar, since it was "very hard to maintain visual contact", as it was very dark at this time. The weather was overcast and there was apparently no moon. (Supp.Tr."A" 10, 27).

Thereafter, McKnight observed an unidentified forty to forty-five foot (40-45') sailboat coming through state waters at the pass at Fort Morgan, which is the same east to west channel across Mobile Bay and is the only area deep enough for navigation. (Supp. Tr."A" 7,27-28,220-221). The sailboat, which was never identified until it was boarded much later, was observed to flash its lights near the clearly marked customs vessel, which was entirely different in configuration from the "Island Girl" (Supp.Tr."A" 7-8, 27-28). Witnesses acknowledged that the channel was of

sufficient width at that point that, in order to see markers, you would have to turn a light from one side to the other to navigate. (Supp.Tr."A" 222).

McKnight acknowledged he had never seen the sailboat prior to that evening, did not know the name of the vessel at any time until it was seized much later the same day, had no information as to the homeport of the vessel, did not know where the vessel came from, had no knowledge whatsoever as to whether the vessel "came foreign" (since, in fact, the ICW runs from east to west and transverses Mobile Bay entirely in state territorial waters), did not know who might be aboard either vessel, could not see any individuals aboard either vessel, and never had any idea what, if anything, might be aboard the vessels. (Supp.Tr."A" 25,27,47,49).

The sailboat allegedly flashed its lights again near the "Island Girl" two (2) miles away, and the vessels were observed by radar only never closer than a quarter of a

mile apart proceeding east through the ICW. The vessels were met by other navigation that night. The other vessels were also observed utilizing spotlights to locate buoys or day markers to assist in navigation in view of the darkness. (Supp.Tr."A" 58).

All activities involving the surveillance were directed by Baldwin County Deputies, specifically James W. Anderson, Chief Deputy, who operated the radio command post and assumed responsibility for "directing the operation", including coordinating surveillance, and by Deputy Bobby Stewart in charge of a land team located near Anderson. (Supp.Tr."A" 76,81).

Deputy Anderson specifically ordered the customs vessel to stop its engines at one point. The sailboat was observed to round a point in land and proceed in a northwardly direction where it subsequently berthed in a cove. The motor vessel, "Island Girl", was observed to proceed in an entirely different direction, where it

stalled again due to intermitted engine difficulty near Bear Point Marina, which was its point of origin. (Supp.Tr."A" 226-227,229).

Nothing further was observed. A report was then received by a land team that some individual had walked into its area. Baldwin County Deputies then gave specific orders to "move in" and "take the vessel down". (Supp. Tr."A" 243-249, 252-252).

The motor vessel, "Island Girl", was boarded first by County Deputy, Howell, State ABC Investigator, Little, and Customs Officer, Montgomery, in response to the order. (Supp.Tr."A" 253). O'Leary and the other occupant of the "Island Girl" were observed below in the engine room "playing with the engine", making repairs to a "malfunctioning engine", later described by an experienced officer who attempted to move the vessel at the request of the Sheriff's Deputies. (Supp.Tr."A" 343). O'Leary was commanded to come on deck and identified him-

self as the Captain in response to questions at gunpoint by Deputy Howell, who then put O'Leary under arrest for possession of controlled substances, none of which were ever seen or found on the "Island Girl". (Supp. Tr."A" 343-345).

The berthed sailboat was then boarded from land by a number of Baldwin County Deputies, ABC Agents, and by a Customs Officer, McKnight, who testified that he would not have boarded the sailing vessel in the absence of the deputies' radio command and stated that he "wouldn't have had any reason" to board the vessel other than the specific command. (Supp.Tr."A" 64-66)(emp. supplied).

After an extensive search of the unoccupied sailboat, materials believed to be contraband were located under a covering in the hold of the sailboat. (Supp.Tr."A" 74-76). Chief Deputy Anderson testified that the purpose of the order for both boardings was

to "search for contraband or something". (Supp. Tr."A" 95).

The vessels were boarded without consent and without a duly authorized search warrant. No police officer during the entire course of the surveillance had ever observed any contraband aboard either vessel nor had any individuals been observed.

The vessels were moved to a nearby marina and searched for a third warrantless search. (Supp. Tr."A" 96-97). Inventories were made but never given to any individual arrested and navigation charts were allegedly taken from the inventorying officer but never listed on any inventory and never produced or made known to counsel until their introduction at trial. (Supp.Tr."A" 96-97,129).

No effort was made to contend the vessels were boarded for a document search. The exclusive motivation was an exploratory search for "contraband." (Supp.Tr."A" 38,29,54). No effort was made to obtain a

search warrant for either vessel, despite the fact that a judge lived a few miles distant. (Supp.Tr."A" 133,136). A search warrant was later obtained for motel rooms on admittedly manufactured circumstances by another deputy who had not participated in any of the surveillance, arrests, or searches, and who had no personal knowledge of any details. (Supp.Tr."A" 373-392). Both of the motel rooms had been previously visited by yet another deputy who conducted what he described as a "visual search" of both rooms. (Supp.Tr."A" 291-292, 294-295).

At trial, evidence was admitted over objection concerning the contraband seized aboard the sailboat, a handgun discovered on the motor vessel (which was not the subject of any charge), and two charts (State's Exhibits 2 and 3) allegedly found aboard the sailboat, one of which was later claimed to have been found aboard the motor vessel, but neither of which were ever listed on invento-

ries nor ever disclosed to counsel, despite appropriate requests. (Trial Tr. 358-361).

The Jury returned a verdict of "guilty", and a maximum sentence of fifteen (15) years was immediately imposed upon Defendant.

3. REVERSAL OF AUTOMATIC STANDING RULE:

The hearings on Petitioner's Motion to Suppress, the trial, and the filing of the Petitioner's briefs with the intermediate State Appellate Court all occurred prior to the reversal of the "Automatic Standing Rule" of Jones v. United States, 362 U.S., 257, 80 S.Ct. 725 4 L.Ed.2d 697 (1960) in the companion decisions of United States v. Salvucci and Rawlings v. Kentucky, supra., which required the reversal and remand of a case where defendants had relied on the "Automatic Standing Rule" in seeking suppression of unlawfully seized evidence and where defendants had not been afforded the opportunity to demonstrate the violation

of the defendants' own Fourth Amendment rights in connection with the search and seizure.

The Court of Criminal Appeals adopted the decision of a retired Circuit Judge, Leigh M. Clark, who concluded that the Petitioner was without standing since there was "nothing in the record or the transcript to indicate that he owned the "Cher" (the sailboat) or had any legal right to possess or control it" O'Leary v. State, ___ So.2d.____ (Ct. of Criminal Appeals, June 23, 1981), p.10. The State Supreme Court concluded this holding was error but was "error without injury" and "therefore does not require reversal" since that Court "proceeded to address the merits of the search and seizure issue in the context of the provisions of 19 U.S.C. Section 1581(a)" State v. O'Leary, ___ So.2d.___ (Ala.S.Ct. May 21, 1982), p.8.

The State Supreme Court ignored the language of Salvucci and later Federal Court

cases requiring reversal for the purpose of affording hearings on this issue.

4. JURY ISSUES:

Two state laws were in effect but never followed during the proceedings. The first law was involved in the indictment stage, and the second law became effective prior to the trial.

Petitioner challenged the Grand Jury that returned the indictment against him under the provisions of the old law (Code of Alabama 1975, Section 12-16-1, et seq.) and received an adverse ruling in the Trial Court and on appeal.

As summarized below, evidence at a hearing on a joint hearing to quash the indictment returned against the Petitioner and others reflected that the Jury Commission ignored the applicable provision of Code of Alabama 1975 to such an extent that the purpose of the statute was not substantially served and Defendant was deprived of his Constitutional Rights:

(1) Section 12-16-39 required the Clerk to prepare a master list of the names of all citizens of the county who were age-eligible for jury duty. No such list had ever been prepared during the memory of any jury commissioner, and the Clerk testified that she had no knowledge that she was required by law to prepare such a list. (Joint Tr. 121,176,197,212,242).

(2) Section 12-16-41 required the Clerk to scan certain lists, including registration lists. This task had never been performed. (Joint Tr. 123,213).

(3) Section 12-16-42 required annual meetings of the Jury Commission for the purpose of preparing a jury roll. The Jury Commission met occasionally, never prepared a jury roll, and merely added the names of persons they knew "personally". (Joint Tr. 178,200,218,248,245).

(4) Section 12-16-42 required jury rolls to be placed in a substantial metal box that was to be locked and kept in a safe

or vault. The box was often kept in an open courtroom and left unattended for extended periods of time. (Joint Tr. 51-52,86).

(5) Sections 12-16-45 and 12-16-46 dealt with replentishing the jury box upon its exhaustion or depletion. The box was never depleted. The names of a mere three thousand one hundred forty-five (3,145) persons on the jury roll in a county with a 1970 population of fifty-nine thousand three hundred eighty-two (59,382) were merely "recycled" by redepositing the same names over and over again into the jury box. (Joint Tr. 44,49,102-7).

(6) Sections 12-16-70 and 12-16-75 prohibited the return of the names of any jurors. This requirement was totally ignored. (Joint Tr. 47,49,102-7).

(7) Section 12-16-74 placed the responsibility on the Trial Court for passing on excuses, claims of exemptions, and qualifications. The Clerk of the Commission sometimes exercised this function when indi-

viduals told commissioners they did not want to serve on jury duty. (Joint Tr. 194).

(8) Section 12-16-2 set forth twenty-three (23) categories of persons entirely exempt from jury duty based upon the nature of their employment only.

(9) Petitioner's original trial venire contained the names of four (4) individuals whose names did not appear on any records maintained by the Clerk's Office, and there were repeated instances of multiple terms of jury service by the same individuals due to the "recycling process". (Joint Tr. 157-173, 280-281).

(10) The integrity of the statutory scheme was irrevocably impaired by the practice of Commissioner Foster of "purifying" his candidates for inclusion on the jury roll by first clearing them with the District Attorney. (Joint Tr. 221).

Petitioner also challenged the Petit Jury summoned for his July 31, 1978, trial, based on a new jury act (Act Number 594,

1978 regular session codified as Code of Alabama 1975, Volume 11-Pocket Part, Section 12-16-2), which became effective on April 27, 1978. The Act repealed many provisions of the old jury law, including those concerning exemption from jury duty and qualifications for jury service, and set forth an entirely new statutory scheme similar to many Federal Court plans.

Petitioner sought by Motion to either quash the July 31, 1978, Petit Jury Venire or, in the alternative, continue his case, pending the implementation of the new act. A hearing conducted on July 24, 1978, reflected that the proposed Petit Jury Venire had been selected in accordance with the challenged procedures followed under the old law; that the new law had not been implemented; that the Jury Commission was in the process of attempting to comply with the new statute and full compliance was expected within a mere three (3) months.(Supp.Tr."C" 1-5).

The Trial Court denied the Motion in all respects, and the State Courts affirmed on appeal.

H. STAGE AT WHICH ISSUES WERE RAISED:

The issues of unconstitutional search and seizure and unlawful arrest were raised by Motion to Suppress, Motion to Exclude, Motion for Judgment of Acquittal, and Motion for New Trial at the trial stage, and adverse rulings were received in each instance (Trial Tr. 578,582,593,709,740). The issues were also presented at each stage of the appeal by brief and by Petition for Additional or Corrected Statement of Facts, etc., directed to the Court of Criminal Appeals.

The issue involving the Appellate Court's failure to remand for hearing following the change in the law concerning "automatic standing" by this Court did not arise until after the decision rendered by the Court of Criminal Appeals. The issue was then raised at the earliest opportunity before the State Supreme Court, which treated

the lower court's opinion as "error without injury."

The issues involving the Grand and Petit Jury Venires were raised by Motion to Quash Indictment and Strike Venire of Grand Jurors and Motion to Quash Petit Jury or in the Alternative for Continuance. (Trial Tr.623,629). The issues were also presented at each stage of the appeal by brief and by Petition for Additional or Corrected Statement of Facts, etc., directed to the Court of Criminal Appeals.

I. ARGUMENT:

1-2. UNCONSTITUTIONAL SEARCH AND SEIZURE AND UNLAWFUL ARREST:

The facts clearly demonstrate that the vessels involved were boarded only at the order of Baldwin County Deputies based on their naked suspicion alone. The State has never attempted to justify the rape of the vessels involved under any exception allowing search without warrant.

The State has cited the provisions of 19 U.S.C. Section 1581 as a basis for the exploratory warrantless search; however, the sailboat was first sighted within the territorial waters of the United States in the east to west intercoastal waterway transversing Mobile Bay, which is the only point of sufficient depth for navigation. The Customs Officers who later boarded the sailboat, only on the orders of the Baldwin County Deputies, had no prior information concerning the sailboat having been outside the territorial limits of the United States

or having contacted any other vessel which had been in international waters. The officers had never seen the sailboat prior to the evening in question, did not know the name of the vessel, had no information as to the homeport of the vessel, had no knowledge, whatsoever, whether the boat "came foreign", did not know who might be aboard the vessel, could not see any individuals aboard the vessel, and had no idea what, if anything, might be aboard the vessel.

There were no articulable facts upon which any boarding could be made under the claimed authority of the statute. This Court recently granted certiorari in United States v. Villanmonta-Marquez, 652 F.2d 481 (5th Cir.), rehearing En. Banc. denied 661 F.2d 577 (5th Cir. 1981), Petition for Cert. granted, ___ U.S. Law Week __, June 7, 1982, in a situation where the Fifth Circuit reasoned "the facts could support nothing more that a generalized suspicion and speculation in the minds of officer". Id. 652 F2d 488.

Moreover, Petitioner contends the statute itself is unconstitutional for failure to impose geographical limits or restraints on the expansive language.

The Fourth Amendment imposes a reasonableness requirement on custom searches. United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). Strict application of the literal terms of the above-quoted statute to every vessel would "subvert" the Fourth Amendment. United States v. Jones, 528 F.2d 303, 304 (9th Cir. 1975).

3. REVERSAL OF AUTOMATIC STANDING QUESTION:

The State Courts' switch from "no standing" to "error without injury" totally ignores the now clear mandate of the companion decisions of Salvucci and Rawlings, supra. In Salvucci, this Court noted:

> We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated.

In the instant case, Petitioner's hearing on Motion to Suppress was held on February 14-17, 1978, and the Petitioner relied upon "automatic standing" and could not have known that the "automatic standing" doctrine would be specifically overruled by this Court. See also United States v. Molina-Garcia, 634 F.2d 217,218, Note 1 (5th Cir. 1981).

4. JURY ISSUES:

The State Court erred in its application of the Fifth, Sixth, and Fourteenth Amendments to the Constitution and the laws of the State of Alabama with respect to the Grand and Petit Jury Challenges. The denial of these fundamental rights warrants reversal.

The Jury Commission in Baldwin County completely ignored the applicable statutory provisions of the old jury law which were in effect and used to summon and impanel the

Grand Jury that returned the indictment against the Defendant.

Petitioner respectfully asserts that the integrity of the statutory scheme was irrevocably impaired by the Commissioner's practice of "purifying" potential candidates for inclusion on the jury, as well as by the repeated "recycling" of the three thousand one hundred forty-five (3,145) persons on the jury roll which resulted in "blue ribbon prosecution juries" which excluded a broad spectrum of the population of the county, including those specifically exempted by occupation.

The Petit Jury challenge was based on the provisions of a new law that became effective April 27, 1978, requiring the complete emptying and refilling of the jury box in July of that year and repealed the exemptions based on employment. The new act also created an entirely new scheme designed to secure a cross-section of the community.

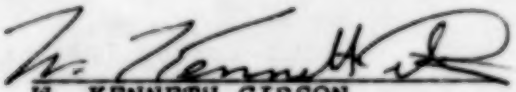
Evidence at the hearing on the Motion demonstrated that the Jury Commission was in the process of attempting to comply with that statute and expected full compliance within a matter of three (3) months. (Supp.Tr."C" 1-5).

J. RECENT DECISION GRANTING WRIT OF CERTIORARI IN RELATED CASE:

The attention of the reader is directed to the recent ruling of the United States Supreme Court granting a Writ of Certiorari in United States v. Villamonte-Marquez, 652 F2d 481 (5th Cir. 1981), rehearing En. Banc. denied 651 F2d 577 (5th Cir. 1981), Petition for Cert. granted, ___ U.S. Law Week ___ (June 7, 1982). The Fifth Circuit opinion dealt with the application and constitutionality of 19 U.S.C. Section 1581.

WHEREFORE, Petitioner respectfully requests that after a preliminary examination, the Writ of Certiorari be granted in this case and that this Court proceed under its rules to review the matters complained of and to reverse the judgment of the State

Courts and for such other relief as to which Petitioner may be entitled, premises considered.



W. KENNETH GIBSON
Attorney for Petitioner

CERTIFICATE OF APPLICABILITY

Petitioner certifies and herein recites that 28 U.S.C.A. Section 2403 is or may be applicable in that the constitutionality of the provisions of 19 U.S.C.A. Section 1581 are drawn into question and neither the United States nor any agency, officer, or employee thereof is a party. Petitioner further certifies that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, by United States Mail on the date indicated below.

CERTIFICATE OF FILING

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required by Rule 19 of the Supreme Court Rules to be filed, to-wit, an original and forty (40) copies, with the Clerk of the United States Supreme Court, were placed by me in the United States Mail, certified, return receipt requested, first-class postage prepaid, addressed to The Honorable Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19 of the Supreme Court Rules, on the date indicated below.

CERTIFICATE OF SERVICE

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required

by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing a copy of the petition to the Attorney General of the State of Alabama, by certified mail, return receipt requested, first-class postage prepaid, addressed to The Honorable J. Anthony McLain, Assistant Attorney General of the State of Alabama, and that an additional copy has been served pursuant to Rule 28.4(b) upon the Solicitor General, Department of Justice, Washington, D.C. 20530, on the date indicated below.

Done this 14th day of September, 1982, by depositing the same in the United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk and parties indicated hereinabove on this date.

W. KENNETH GIBSON
Attorney for Petitioner

Sworn to and subscribed
before me on this the
14th day of September, 1982.

NOTARY PUBLIC
My Commission Expires December 5, 1983

82-643

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT NUMBER _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

DANIEL P. O'LEARY,

Petitioner - Appellant,

V.

STATE OF ALABAMA,

Respondent - Appellee,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TABLE OF CONTENTS

		Page
I.	O'Leary v. State, 417 So.2d 214 (Ct. of Crim. Apps. of Ala. May 6, 1980), rehearing denied May 27, 1980.	1
II.	O'Leary v. State, 417 So.2d 217 (Sup.Ct. of Ala. Jan. 9, 1981), rehearing denied Feb. 6, 1981.	14
III.	O'Leary v. State, 417 So.2d 219 (Ct. of Crim. Apps. of Ala. on remand, June 23, 1981), rehearing denied Aug. 4, 1981.	19
IV.	O'Leary v. State, ___ So.2d (Sup.Ct. of Ala., Nov. 23, 1981), cert. granted.	67
V.	O'Leary v. State, 417 So.2d 232 (Sup.Ct. of Ala. May 21, 1982), rehearing denied 417 So.2d 241 (Sup.Ct. of Ala., July 16, 1982).	68
VI.	Amendments IV,V,VI, XIV to United States Constitution	98
VII.	Text of New Jury Act, Act 594, Code of Alabama 1975, 12-26-1, et. seq.	99
VIII.	Text of 19 U.S.C. 1581	108
IX.	Certificate of Service	109
X.	Certificate of Filing	110

I.

Daniel P. O'LEARY

v.

STATE.

1 Div. 994.

Court of Criminal Appeals of Alabama.

May 6, 1980.

Rehearing Denied May 27, 1980.

TYSON, Judge.

Daniel P. O'Leary was indicted by the grand jury for the offense of possession of marijuana. His jury trial resulted in a conviction and sentence of fifteen years imprisonment in the penitentiary.

The dispositive issue on this appeal is whether or not the appellant was ever arraigned on the charge for which he was indicted and convicted. From our examination of the record we conclude he was not so ar-

raigned and, therefore, reverse and remand this case for a new trial.

Appellant was called for arraignment on January 23, 1978, but was not present. There is no dispute as to this date. At that time defense counsel moved the court to postpone arraignment until the day of trial so that appellant, who resided out of state, would not be forced to make a long trip solely for the purpose of arraignment. The court granted this motion (see Supp.E, pp. 59-60).

The trial of the case began on July 31, 1978, and the appellant was subsequently found guilty by the jury. The original minute entry in this cause reads as follows (Vol.IV, p.708).

"JURY & VERDICT

"8/2/78; This day in open Court came the State of Alabama by its District Attorney, and the Defendant in his own proper person, and with his attorney, and the trial of this case having been regularly set for this day, thereupon,

in open Court on this day in the presence of the District Attorney, defendant's attorney, and the defendant, came a jury of good and lawful men and women, to-wit: Morgan J. Odom, and eleven others, who, having been duly impanelled and sworn according to law, who, having heard the evidence, and the charge of the Court, upon their oaths, in open court on this day in the presence of the District Attorney, defendant's attorney and the defendant, do say: 'WE, THE JURY, FIND THE DEFENDANT GUILTY.'

"Thereupon in open court on this day the defendant in the presence of his attorney being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied 'he had not.' It is therefore considered and adjudged by the Court that the defendant is guilty of the offense of Possession of Controlled Substances, and that the defendant be and he is hereby sentenced to a period of Fifteen (15) years in the State Penitentiary.

"Sentence suspended pending appeal and appearance bond set in the amount of One Hundred Thousand Dollars ($100,000.00)."

On January 29, 1979, a motion to correct or modify the record was filed by the State of Alabama (Supp.E, pp.90-91). The motion requested the trial court to

correct the record by adding an arraignment of the appellant to the minute entry. On February 12, 1979, a hearing on the motion was conducted.

Morgan Odum, a resident of Foley, Alabama, testified that he was a juror at appellant's trial on July 31, 1978. He stated that he remembered seeing the prosecutor read the charges to the appellant and that he remembered that the appellant plead not guilty thereto. On cross-examination, Mr. Odum testified that he had been on juries in two previous criminal trials and he saw the defendants in both trials arraigned immediately prior to trial. He recalled that the appellant was called upon to plead prior to voir dire examination of the jury. He stated he never discussed appellant's alleged arraignment with the district attorney until a few minutes before the hearing that day. Thomas Benton, Sheriff of Baldwin County,

testified that he recalled that the appellant was arraigned the morning of his trial and that the court reporter was not present at the time. He stated that his recollection of the sequence of events on the morning of the trial was as follows: First, the sheriff called the roll of the jury, then the judge sounded the docket. According to the sheriff, when the O'Leary case, this instant cause, was sounded, the judge called the appellant before him and held the arraignment. Thereafter, the jury was struck and the case proceeded to trial.

Bobby Stewart, Chief Criminal Investigator for Baldwin County, testified that he was present in court on the morning of July 31, 1978, and remembered the appellant's being arraigned. He stated that after the indictment was read the judge instructed him to go find the court reporter, who was absent from the courtroom at that time. On Cross-examination, Mr.

Stewart stated that one of the appellant's lawyers answered for the appellant when he was called upon to plead.

William Kenneth Gibson testified that he is an attorney in Fairhope, Alabama, and was one of the attorneys who represented the appellant at trial on July 31, 1978. His recollection of the events that morning was as follows: First, the judge sounded the docket. When appellant's case came up, Lloyd Taylor, another of appellant's attorneys, made an oral motion to continue the case pending the resolution of a motion before the United States Supreme Court which concerned the present case. The trial judge denied the motion and the attorneys proceeded with the voir dire examination and selection of the jury. Thereafter, the trial proceeded with the various witnesses who were called and who testified. Mr. Gibson stated that the court reporter was present during these proceedings and that at

no time did appellant plead to the indictment. Mr. Gibson explained that, at the time of the trial, he was under the impression that the appellant had been arraigned earlier and he did not become aware of the omission until the record had been transcribed.

Lloyd Taylor testified that he also represented the appellant at his trial on July 31, 1978. His testimony covered substantially the same ground as that of Mr. Gibson. He stated that appellant's lawyers had taken great pains to instruct the court reporter to take down every word that was spoken in regard to the O'Leary case whether it was part of the official record or not. Mr. Taylor stated positively that at no time was the appellant ever arraigned nor was a plea of not guilty ever entered on his behalf by the trial court. Mr. Taylor said one reason he is so sure that there was no arraignment was that no competent defense attorney would

have allowed his client to have been arraigned in the presence of prospective jurors.

The defense also placed into evidence at this hearing affidavits signed by appellant's other attorneys at trial, Honorable Phillip Carlton, Jr., Honorable Peter F. K. Baraban, and Honorable Robert B. French, Jr. The affidavits stated that to the best of the attorney's information, knowledge and belief the appellant was not arraigned on July 31, 1978, the date of trial.

At the close of the hearing, the trial court granted the State's motion and caused the following minute entry to become part of the record (Supp.E, p.106):

> "[T]he Court having heard the argument of counsel on said motion, and considered and understood the same, is of the opinion that the same is well taken and the said motion should be granted: It is therefore ordered and adjudged by the Court that said Motion to Correct or Modify the Record be and the same

> hereby is granted to show that on July 31, 1978, the Defendant was arraigned in open Court with his attorneys of record and entered a plea of not guilty."

Thereafter, on February 21, 1979, defense counsel filed a motion for reconsideration or in the alternative for specific findings. This motion was denied.

On March 12, 1979, this court granted appellant's petition for writ of mandamus in Ex parte Daniel P. O'Leary, 1 Div. 40, and thereby directed the trial court to order a transcription of the court reporter's notes made prior to trial on July 31, 1978, and further directed the trial court to hold another hearing.

A second hearing on the matter was held on August 21, 1979. The defense first called David Williams, who testified that he was one of the court reporters at appellant's trial. Mr. Williams identified a transcript of stenographic notes he made

on the morning of July 31, 1978. Mr. Williams stated that prior to trial he agreed with the defense attorneys to take down all of the proceedings regarding the appellant. He stated further that the transcription of the notes he took that morning reflected all of the proceedings that took place in his presence (Supp. F, pp.9-10). From the record (Supp. F, p.11):

> "Q. Do your notes start off with the sounding of the docket of Daniel P. O'Leary? When Daniel P. O'Leary's name was sounded, isn't that what your first notes show?
>
> "A. Right. Mr. Hendrix said, 'We come to Daniel P. O'Leary.'
> "And that's the notes that I have. What went on prior to that, I don't know.
>
> "Q. Now, did you leave the courtroom while any proceedings were going on after that point in time?
>
> "A. No, not until one o'clock."

The transcript of Mr. William's stenographic notes absolutely does not

reflect an arraignment of the appellant. (emphasis original)

Phillip Carlton, Jr., Robert B. French, Jr., and Peter F. K. Baraban all testified that they were attorneys for the appellant and that they were present during all the proceedings on July 31, 1978 (emphasis original). All testified that the appellant was not arraigned, nor was a plea entered for him by the court on this date or during trial. (emphasis original) These attorneys also stated that the court reporter was always present during all proceedings involving the appellant.

The appellant also testified that he never pleaded to the indictment.

At the closing of this hearing, the trial court again concluded that "the Defendant was arraigned in open court with his attorneys of record on July 31, 1978, and entered a plea of not guilty" (Supp. F, p. 100).

I

We have carefully examined the original record of four volumes and reviewed the voluminous supplement of ten volumes, plus exhibits, in this cause and are of the opinion that the trial court erred in finding that appellant was in fact arraigned on the morning of trial in this cause, to-wit, July 31, 1978.

> "...[W]e are not unmindful of the rule that when, as here, the evidence was heard orally by the trial judge, his findings have the weight of a jury's verdict and will not be disturbed on appeal unless palpably wrong or unjust. "We are unwilling to say that there was no evidence from which the trial court could find the defendant guilty. The judgment of a trial court is a solemn pronouncement, and an appellate court should most hesitantly disturb it. "On the other hand, the duty remains in this Court 'to revise the verdict of juries and the conclusions of trial judges on questions of fact, where, in our opinion, after making all proper allowances and indulging all reasonable intendments in favor of the court below, we reach a clear conclusion that the finding and judgment are wrong.' Bowen v. State, 32 Ala.App. 357, 26 So.2d 205; Taylor v. State, 30

Ala.App. 316, 5 So.2d 117."
Kelley v. State, 273 Ala.240,243,244, 139 So.2d 326 (1962).

It has long been the law in Alabama that reversal of a conviction is mandated if the record does not affirmatively show that the defendant pleaded to the indictment either personally or through counsel or that the court caused the plea of not guilty to be entered for him before the jury retired. Rucker v. State, Ala.,340 So.2d 830 (1976); Ludlum v. State, 52 Ala.App. 631, 296 So.2d 254 (1974); Newsome v. State, 49 Ala.App. 248, 270 So.2d 680 (1972); Strong v. State, 47 Ala.App. 238, 252 So.2d 659 (1971); Huddleston v. State, 37 Ala.App. 57, 64 So.2d 90 (1953).

Because of our holding we must reverse and remand this cause for a new trial; we, therefore, pretermit discussion of appellant's other assignments of error.

REVERSED AND REMANDED.

All the Judges concur.

II.

Ex parte State of Alabama, ex rel.
Attorney General.
(Re Daniel P. O'LEARY
v.
STATE of Alabama).
79-680.
Supreme Court of Alabama
Jan. 9, 1981.
Rehearing Denied Feb. 6, 1981.

BEATTY, Justice.

The facts of this case are sufficiently set forth in the opinion of the Court of Criminal Appeals. O'Leary v. State, Ala., [MS. May 6, 1980] 417 So.2d 214 (1980). We granted certiorari to ascertain whether that opinion conflicts with the principle of law expressed in Simmons v. F.W. Dodge Corporation, 270 Ala. 616, 120 So.2d 921 (1960), viz: that a reviewing court will not

weigh evidence as to any fact found by the trial court, but if there is any evidence, or any reasonable inference from the evidence to support the conclusion of that court, the judgment will not be disturbed. See also 2A Ala. Dig., Appeal & Error, Keys 989,996,1010(1).

We have concluded that the Court of Criminal Appeals was in error in its application of that principle to the facts of this case. Our review of the record discloses evidence supporting the finding of the trial court holding that the respondent, O'Leary, had been arraigned in the trial court.

Two hearings were conducted by the trial court in order to determine whether, in fact, (emphasis original) the respondent had been arraigned. During the first hearing the evidence of this fact was sharply disputed: the sheriff, an investigator, and a juror testified to an arraignment having taken place while, on the other hand, the petitioner's two lawyers

testified that none had occurred, and they introduced the affidavit of three other lawyers to that same effect. Based on the evidence adduced at that hearing, the trial court found that an arraignment had occurred and corrected the record accordingly. Later, in accordance with the writ of mandamus issued by the Court of Criminal Appeals, the trial court conducted another hearing, which included testimony of the court reporter, the introduction of a transcript of the reporter's notes, and testimony of the respondent himself, all supporting the conclusion that an arraignment had not taken place.

In reaching its conclusion that the record did not affirmatively show that the defendant/respondent pleaded to the indictment, the Court of Criminal Appeals doubtless gave great, and in our judgment, undue weight to the transcript of the court reporter's stenographic notes, which did not reflect an arraignment, although that court

also considered the unanimous testimony of the respondent's attorneys. In this, we have concluded, the Court of Criminal Appeals has erred, for the effect of its decision, in the face of this disputed fact, has been to give preferential treatment to one form of evidence over another, rather than to follow the rule of review to which we have heretofore referred. We have been cited to no authority which gives to a court reporter's stenographic notes a conclusive presumption of accuracy or otherwise prevents their content from being impeached or contradicted. Any such conclusion aside, there was evidence on both sides of the issue presented to the trial court. When the trial judge sits as a finder of fact and hears and observes witnesses as they speak, his judgment is presumed correct and will not be reversed if it is supported by legal evidence and is not clearly wrong and unjust. Barbour v. Department of Pensions

& Security, Ala.Civ.App., 367 So.2d 470 (1978).

For these reasons the judgment of the Court of Criminal Appeals must be, and is, reversed and this cause is remanded for an order not inconsistent with this opinion.

REVERSED AND REMANDED.

TORBERT, C. J., and MADDOX, FAULKNER, JONES, SHORES and EMBRY, JJ., concur.

ALMON and ADAMS, JJ., not sitting.

III.

Daniel P. O'LEARY

v.

STATE of Alabama.

1 Div. 994.

Court of Criminal Appeals of Alabama.

June 23, 1981.

Rehearing Denied Aug. 4, 1981.

LEIGH M. CLARK, Retired Circuit Judge.

In accordance with the opinion of the Supreme Court of Alabama in this cause (January 9, 1981) reversing our judgment heretofore rendered, we proceed to review the case on appeal as to all issues presented other than the one determined by the Alabama Supreme Court.

Two issues on appeal relate to the composition of the jury roll of Baldwin County, the placement of cards bearing the names of persons on the jury roll, into the jury box,

and the resultant composition of said jury box, from which the names of jurors were drawn at random by a circuit judge to constitute (1) venire from which names of the grand jury that indicted defendant were drawn at random by a circuit judge and (2) the names that were drawn at random therefrom to form the venire of the petit jury from which the jury that tried defendant was selected. Appellant contends that as to (1) the court erred in denying the defendant's "motion to quash the grand jury venire which returned the indictment against him." As to (2), appellant says that the court erred in denying defendant's motion to strike the "petit jury venire or in the alternative continue the trial of the cause pending the implementation of a new jury act," Acts 1978, Regular Session, No. 594, p. 712 et seq., approved April 27, 1978.

As to (1), appellant concedes that the issue has been determined adversely to him

in Oyarzun v. Pittman, Ala.Cr.App., 367 So.2d 574, cert. denied, Ala., 367 So.2d 584. In Oyarzun, the appellant was one of approximately ten individuals who had been arrested for and charged with the possession of a large amount of marijuana that formed the basis of the prosecution in the instant case.

It was held in Oyarzun that he was not entitled to a judgment in his favor on his petition for a writ of mandamus against the clerk, chairman and members of the Baldwin County Jury Commission, alleging that they had failed to carry out their duties as to the jury roll and filling the jury box with the names of proper prospective jurors. By agreement of the parties in this case and in Oyarzun, the motion in this case, as to the grand jury that indicted this appellant, and the petition for mandamus in Oyarzun were consolidated for the purpose of a hearing of both, which was

conducted and which included a large amount of evidence. The parties herein have stipulated that the transcript of the evidence in Oyarzun shall be considered as if it were a part of the transcript in this case. We adhere to the conclusion reached therein, and we see no good reason to supplement, or otherwise change in any way, the opinion in Oyarzun v. Pittman, supra.

As to (2), it necessarily follows, we think, that what was held in Oyarzun is applicable, except as the question may be affected by the provisions of Acts 1978, Regular Session, No. 594, which was enacted subsequent to the hearing by the trial court of the petition for mandamus in Oyarzun and made material changes in the preexisting statutory law as to "County Jury Commissions" throughout Alabama. According to Acts 1978, No. 594, it became effective on the date of its approval, April 27, 1978. One of a number of major changes in the law made by Acts 1978, No. 594, was that the

jury box, called the "master jury box," to distinguish it from the "trial court jury box" to be maintained by the jury commission, was not required to be filled with the names (cards) of all of the persons on the county jury roll or "list", as the same is called by Acts 1978, No. 594. Section 4 of said Act provides in detail for the number and the percentage "of the total number of names on the master list" to be placed in the master jury box and a formula for computing how many go into the box so as to further secure the selection "at random from a fair cross section" of the area affected and "the opportunity" of residents thereof "to be considered for jury service," as expressed in Section 1 of the Act. See also ARJA Rule 46 as to the formula.

In pressing his contention that the court erred in denying defendant's motion to strike the "petit jury venire or in the alternative continue the trial of the cause

pending the implementation of the new jury act," appellant relies heavily upon the following provision of Section 4(b) of the Act:

> "In July of each even-numbered year, the master jury box shall be emptied and refilled as herein prescribed."

Defendant's motion "to strike venire of petit jurors. . .or in the alternative to continue" the cause was filed on July 21, 1978. The case was then set for trial for July 31, 1978, after one or more continuances at the request of the defendant. The motion was heard on July 24.

The hearing on the particular motion was replete with evidence of the utter impossibility of an instantaneous metamorphosis from the established procedure prior to April 27, 1978, to the procedure enacted by Acts 1978, No. 594. It became apparent that in Baldwin County, as well as in other counties of the State, conversion from one proce-

dure into the other would require considerable time, so much, that to have suspended the trial of jury cases during all of that time would have seriously impaired the administration of justice, jeopardized the right of the accused in criminal prosecutions to a speedy trial and would have collided with the spirit and beneficent policy of Acts 1978, No. 594. In recognition of the impossibility of a compliance with the spirit of the new law, the Legislature by Acts 1978, 2d Ex.Sess., No. 14, Section 1, on August 7, 1978, changed the date for emptying and refilling the box from July 31, 1978, to December 31, 1978.

The evidence as a whole on the hearing of the motion to strike the petit jury venire shows that the jury commission and its employees had pursued substantially the same procedures it had previously followed except as they were augmented by its ef-

forts, and they were many, to bring about a compliance with Acts 1978, No. 594 and a complete compliance therewith as soon as practicable. Some claimed irregularities were emphasized by defendant, and we cannot say that some irregularities did not exist, but we find none that are materially significant or that constitute a violation of any constitutional right of defendant. The claimed irregularities are of the same nature as the claimed irregularities that were thoroughly considered and correctly determined, in our continuing opinion, by Judge DeCarlo in Oyarzun v. Pittman, supra. The motion of defendant to strike the petit jury venire or in the alternative to grant defendant a continuance was properly overruled.

The series of incidents that formed a basis for the prosecution in the instant case, as well as the prosecutions against nine other individuals, transpired during

the last few days and nights of 1977, particularly but not exclusively December 30 and December 31. The indictment of the defendant herein was returned on January 11, 1978. The controlled substance to which the word "marihuana" in the indictment is referable, consisted of twelve bales thereof with a total weight of 4,450 pounds in the stage of "green vegetable material."

For a few days before December 31, 1977, there had been a joint investigation, covering the area of Baldwin County surrounding the place where the marihuana was found and seized, conducted by law enforcement officers of Alabama Bureau of Investigation, United States Customs Service, Alabama Beverage Control Board and Baldwin County Sheriff's Department. It pertained to suspected unlawful activities on water and on land between Ft.Morgan, Alabama, and its environs, and the Alabama-Florida boundary near its southern end, and resulted in the

discovery and seizure, in the early daylight hours of January 31, of the marihuana, on board a vessel that had been traced upon its entry from the Gulf of Mexico to where it had been moored and abandoned by its occupants at Bear Point Marina. The vessel was consistently referred to in the evidence as a "sailboat" by the name of "Cher."

The Cher had been preceded at varying distances by a pleasure yacht by the name of "Island Girl" from the Ft. Morgan area to the area of the Bear Point Marina. It then went only a short distance farther in a generally easterly direction and stopped without coming to land. Soon thereafter, both of the vessels were boarded by some of the law enforcement officers. Those boarding the Cher found the marihuana; those boarding the Island Girl found no marihuana or other controlled substance. On the Island Girl were the defendant (appellant) and another man. They were both arrested on the occa-

sion. On the same occasion, persons who had landed from the Cher were arrested; soon thereafter the marihuana was discovered, and all arrested, including defendant (appellant), were transported to the Baldwin County Jail.

On January 23, 1978, defendant filed a motion for the "suppression of evidence seized by officers without search warrant or warrant of arrest." The motion expressly embraced "papers, documents, vehicles, boats, controlled substances, marijuana, firearms, and any other evidence derived from the stake out, observation, investigation, and arrest of the Defendant on the charge of Possession of Marijuana, a felony." It appears that the motion was consolidated for the purpose of the hearing with motions to suppress filed by nine other defendants indicted in connection with the alleged possession of the marihuana, which hearing was conducted on February 14, 15, 16, 17, 1978.

Much of the evidence, consisting of a transcript of 450, pages, pertained to appellant herein, but much more of it pertained to the other persons, separately indicted, including those who had been on the Cher, with little, if any, relevance to the motion of the appellant herein. Having in mind that appeals from any convictions in the other cases require separate consideration, we carefully refrain herein from considering any issues arising exclusively in any of such cases.

Appellant asserts as error the denial of his motion to suppress and the denial of his motion to exclude the evidence when the State rested. No evidence was presented by defendant on the trial of the case.

We think it unnecessary to discuss some parts of the evidence that the State contends served to connect defendant with the possession of the marihuana, such as his having been observed by some of the officers on

occasions within a week before December 31, 1977, in Gulf Shores and near the Alabama-Florida boundary, for the reason that this opinion would be unduly extended thereby and the circumstances now summarized herein as to what occurred on the night of December 30-31 are sufficient to show that the court was not in error in denying defendant's motion to suppress or in overruling defendant's motion to exclude the evidence.

About nine or nine-thirty P.M. December 30, 1977, the Island Girl was observed by one of the officers testifying leaving Bear Point Marina and proceeding west along the long and winding intercoastal waterway toward Ft. Morgan. It was thereafter followed by U. S. Customs Supervisory Patrol Officer Joe McKnight and A. B. C. Agent Aubrey Little, in an open fishing boat, at Gulf Shores, who maintained visual surveillance of the Island Girl by means of its running lights to a point approximately two miles

east of Ft. Morgan, a total distance of about thirty miles from Bear Point Marina. Meanwhile, according to the testimony of U. S. Customs Agent Jim Moree, he and Mr. Forrest Robinson went to Mobile, obtained a U.S. Customs boat and brought it alongside Agent Little's boat, where it was boarded by S. P. O. McKnight, who commenced and maintained surveillance of Island Girl by radar on the customs boat. Also in the meantime, U. S. Customs Agent Reggie Montgomery and Officer Roland Howell of the Baldwin County Sheriff's Department paralleled largely the travel of the Island Girl and each of the boats following it by their movement on motor vehicles along the highway on the Baldwin County Peninsula between Gulf Shores and Ft. Morgan. Agent Montgomery viewed the Island Girl with binoculars from the end of the pier at the end of the peninsula at Ft. Morgan. He observed what was afterwards de-

termined to be the Cher coming from the Gulf of Mexico. According to the testimony of S. P. O. McKnight, after he had commenced radar surveillance of the Island Girl he observed by radar the sailboat, afterwards determined to be the Cher, and noticed that it "left our location and headed on a straight line toward the blip we had established as being the "Island Girl." He further testified:

> "After the light flashed, the boat moved away from where our boat was, and traveled to a point to a quarter of a mile from the position the Island Girl was in. At this time the Cher gave another flash of deck lights, turned them off, the Island Girl, after a few seconds and flashed back to the sailboat with a spot light or something. We are unable to determine what. Again the Cher turned on its deck lights and again another flash of lights from the Island Girl. At this time they both proceeded eastbound in the intercoastal back towards the Gulf Shores area.
>
> "MR. HENDRIX"
>
> "Q. Which boat was in the lead?
>
> "A. The Island Girl.

"Q. Approximately how far behind the Island Girl did the Cher follow?

"A. The Cher varied its distance anywhere from a quarter mile to half mile. Most of the time a quarter mile distance between the two.

"Q. How far did you maintain your distance between you and Cher?

"A. Ours also varied as to traffic conditions-light tugboat traffic in the Intercoastal. But we stayed a maximum of two miles all the time.

"Q. Did you have them on radar at that time?

"A. Yes, sir."

On cross-examination his testimony continued as follows:

"Q. Could you tell us, sir, when you saw the two boats meet, what do you mean by them meeting?

"A. They came to a point one-quarter mile apart, and light signals were observed from each boat. Any they simultaneously started their movements to the east, and maintained the same distance between them all the way for the entire thirty miles.

"Q. Okay. First of all, they did not come in direct proximity with each other, did they?

"A. They did not touch each other.

"Q. There was a quarter of a mile between them?

"A. Yes, sir.

". . . .

"Q. I see. Are you familiar with the position in which the Island Girl was when the Cher came to rest at some area near the Island?

"A. The Island Girl, when the Cher went into the cut of land-Pirates Cove, the Island Girl remained in the intercoastal approximately a half mile to a mile from that place. It was just east of where the Cher left the intercoastal to go into that point of land. The Island Girl continued to a point just east of that and idled into the Intercoastal Canal."

SPO McKnight testified further that he was among those who boarded the Cher and found the bales of marihuana thereon.

Agent Aubrey Little of the Alabama Bureau of Investigation, (Public Safety) testified that he, with a deputy sheriff and an officer of U. S. Customs boarded the Island Girl soon after it was stopped as

heretofore stated and saw the defendant as they boarded it, who identified himself by name and stated that he was the captain of Island Girl. Another man was on the boat with him.

The hearing of the broadside motion for the suppression of evidence "consisting of papers, documents, vehicles, boats, controlled substances, marihuana, firearms, and any other evidence" failed to develop any evidence of major importance on the question of the guilt or innocence of defendant other than the marihuana found on the Cher. As to the suppression of that evidence, appellant is without standing. There is nothing in the record or the transcript to indicate that he owned the Cher or had any legal right to possess or control it. The only evidence as to his connection with it is that which shows his connection with the contraband it was transporting. By his plea of not guilty, he denies such a connection.

His position in so doing and claiming an interest in the Cher that would entitle him to the benefit of constitutional protection against an unreasonable search and seizure of the Cher is duplicitous. We refrain at this time from going into the question of whether separately indicted codefendants would come under such umbrella, but he did not, according to the record and transcript in this case. Furthermore, whatever interest he had in the marihuana, which the jury by its verdict decided that he had, would not be sufficient to show that the Cher, or that which was searched or seized on the Cher other than the marihuana, was one of his "houses, papers, and [or] effects" as to which the Fourth Amendment to the Constitution of the United States affords security. Evidence as to a pistol found on the Island Girl was of no consequence, had no material bearing on the issue of guilt or innocence of the defendant

and would not have been of any substantial injury to him, even if any objections of defendant justified a ruling in favor of the defendant as to the particular evidence.

Appellant further contends as a basis for his motion to suppress that defendant was arrested without probable cause. We do not agree, but, even so, this would not render inadmissible any of the evidence as to the marihuana and defendant's connection therewith, unless such evidence had become poisoned by the arrest of defendant. The arrest of defendant and the location of the marihuana on the Cher were closely related in point of time and place, and in the events that had transpired prior to the return of the two boats to the area of Pirates Cove, but there was nothing in the arrest of defendant on the Island Girl that proximately caused or contributed to the boarding of the Cher and the location thereon of the marihuana.

It should be said also that a United States Customs officer was among the officers that boarded each of the vessels and that 19 U.S.C.A. Section 1581(a) provides:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters, or as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-11 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any persons, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

The witnesses for the State were vigorously and comprehensively cross-examined by attorneys for the defendant. Their testimony was screened for circumstances that tended to show the possibility of defendant's innocence, and some were found. One was evidence that permitted an inference that the Island Girl was having engine trouble as it returned to the general area

where the Island Girl and the Cher finally stopped, and were boarded by law enforcement officers, and that the engine trouble explained the stopping of the Island Girl as merely approximately coincidental with the landing of the Cher. Even so, there is little reasonable basis for any claim that the meeting between the Island Girl and the Cher at Ft. Morgan as they came from long, diverse paths, the then exchange of signals between them, and the immediate reversal by the Island Girl of the course it had previously taken and its conduct as a pilot or guide to the course taken by the Cher for a distance of approximately thirty miles, the vessels going at approximately the same speed all the time, were merely coincidental. The possibility of defendant's innocence is not disproved by the circumstances, but they are much more consistent with his guilt than his innocence. They furnish substantial evidence that he was guilty as charged in the indictment of the possession

of marihuana, either as a principal or a fortiori as an aider or abettor. The trial court was not in error in denying his motion to exclude the evidence.

By saying that the trial court "erred in instructing the trial jury with respect to the law of this State concerning conspiracy," appellant makes a point that conspiracy is a separate and distinct offense, covered by Code 1975 Sections 13-9-20 through 13-9-25. He is correct in his view that conspiracy as an inchoate crime is a distinct, substantive offense, separate and apart from the consummated crime contemplated by the conspirators. Smith v. State, 8 Ala.App. 187, 62 So. 575 (1913). He is incorrect, however, in his apparent contention that the word "conspire" or "conspiracy" has no proper place in a court's oral charge to the jury as to the law relative to criminal liability of a defendant as an aider, abettor or accomplice of a principal in the

commission of a crime. As stated in Smith v. State, supra, at 62 So. 577-578:

> "When an act, however, has been committed by one of the conspirators in furtherance of the common design, if the act amounts only to a misdemeanor, then all of the conspirators may be indicted and tried either for the conspiracy to commit the act or for the act itself; but, when the act done in such furtherance amounts to a felony, then the lesser offense of the conspiracy to do the act is merged into the higher crime of the act itself, and the conspirators can only be indicted for and convicted of the latter-all as principals under the statute. 6 Am. & Eng.Ency. Law, p. 863. The rules of evidence, however, applicable to the establishment of a conspiracy, are the same, of course, whether the parties are charged and being tried for the conspiracy itself or for the crime committed in execution or attempted execution of it."

There are times, perhaps, when it would be better in cases in which a defendant is on trial as an aider or abettor of a principal of a crime, that the word "conspire" and any derivative thereof not be used in instructions to the jury, so as to avoid thereby any confusion on the subject, but we

find no basis for any confusion to the prejudice of the defendant in the use of such expressions in the oral charge in the instant case. Nevertheless, after an exception taken by the defendant, the trial court said:

> "Well, if there is any question about it-Ladies and gentlemen, you strike from your mind any charge I made concerning conspiracy.
>
> "And I charge you this again: If you are satisfied beyond a reasonable doubt that there was an agreement or joint venture between this defendant or one or more persons to violate the laws of the State of Alabama, that the laws of the State of Alabama were violated, in that he did possess marihuana or aided and assisted in the possession of marihuana, and that the possession was either a direct possession, that he had it in his control or it was in his constructive possession, as I have defined it to you heretofore, the form of your verdict would be: 'We the jury find the defendant guilty.'
>
> "MR. CARLTON: [Defendant's attorney]: We would object to the charge and move for a mistrial.
>
> "THE COURT: Deny the motion."

The action of the trial court as to the subject of conspiracy in its oral charge was not erroneous.

During the testimony of Chief Deputy Sheriff Anderson on the trial of the case, two nautical charts, State's Exhibits 2 and 3, taken off the Island Girl on the morning of December 31, 1977, were admitted in evidence over the objection of defendant. In making the objection, counsel for defendant said, inter alia:

> "I would further make objection on the grounds that those items were seized without benefit of a warrant, and that the State-not the State, but rather the officers had no right to board the Island Girl at that particular time, as there was no allegation this was part of any inventory. Assuming that an inventory would even be proper, and as I suggest, it wouldn't be, as a fruit of a poisonous tree in our motion to suppress. They had no right to board in the first place. But this boarding was at a time they could have secured a search warrant, and did not secure a search warrant but merely went on board and removed therefrom allegedly these charts that are the subject matter of a potential Exhibit."

Appellant asserts that the admission in error of the charts was erroneous. The transcript shows that these exhibits were not among any items discovered on the Island

Girl on the occasion of its being boarded by law enforcement officers and the defendant and his companion were arrested. It was some two hours after that, after defendant and others had been taken to jail and after the marihuana on the Cher had been taken therefrom and loaded on a trailer to be transported to the jail at Bay Minette. At the time Deputy Anderson first saw the charts, he had gone on the Island Girl to supervise or assist the officers already thereon in the process of making an inventory of the contents of Island Girl, that were to be taken therefrom for the usual purposes of a legal inventory of property to be placed in the custody of law enforcement officers that had recently been in possession of persons who by reason of their arrest and imprisonment were no longer able to safeguard the property from theft, despoliation or destruction. An inventory under such circumstances does not constitute a violation of Fourth Amendment rights.

South Dakota v. Opperman, 428 U.S. 364,367, 368, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); Wilkinson v. State, Ala.Cr.App., 374 So.2d 396, 398 (1979), cert. denied, Ala., 374 So.2d 400 (1979). Some years before the pronouncement by the Supreme Court in South Dakota v. Opperman, supra, it was stated in United States v. Gravitt, 484 F.2d 375, 378 (5th Cir. 1973), cert. denied, 414 U. S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974):

> "This Court has consistently recognized that the fourth amendment is not violated when the police take custody of the property of persons they arrest to store that property for safe keeping. United States v. Rosenburg, 5 Cir. 1972, 458 F.2d 1183; United States v. Boyd, 5 Cir. 1971, 436 F.2d 1203; United States v. Lipscomb, 5 Cir. 1971, 435 F.2d 795. In those, and other cases that might be cited, we recognized that when the police take custody of any sort of container-be it an automobile, suitcase, or any other thing in which property may be stored-it is reasonable to search the container to itemize the property to be held by the police. Boyd, 436 F.2d at 1185; Lipscomb, 435 F.2d at 800-801. These decisions reflect, of course, the underlying principle that the fourth amendment proscribes only

> unreasonable (emphasis original) searches. Lipscomb, 435 F.2d at 800 citing Terry v. Ohio, 1968, 392 U.S. 1, 9, 88 S.Ct. 1868, [1873], 20 L.Ed.2d 889, 899. In Lipscomb we articulated the considerations underlying the view that custodial seizures and accompanying inventory searches are reasonable:
>
> "It cannot be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to him.
>
> "435 F.2d at 800."

In addition to defendant's grounds for objections to the introduction of State's Exhibits 2 and 3, indicated above, defendant asserted grounds to the effect that the chain of custody as to the exhibits had not been show, that there had been some alteration of the designation or number of each of the items, and other handwriting thereon, and that they were not produced at the hearing on defendant's motion to suppress the evidence. The transcript shows

that after the admission of the exhibits in evidence, the witness was subjected to extensive and intensive cross-examination by defendant in which he was interrogated as to all of the matters embraced in such grounds of objection. No further ruling as to the admissibility of the evidence was ever invoked. Our conclusion is that the chain of custody was shown, there had been no material change in the exhibits subsequent to their discovery on the Island Girl and that there had been no intentional withholding of them from the hearing on the motion to suppress, which may have been, as appellant asserts, considered by all concerned as including a pretrial motion to produce. The trial court was not in error in admitting in evidence State's Exhibits 2 and 3.

In two separate sections of his brief and argument, one captioned "Prejudicial Comments and Remarks" and the other cap-

tioned "Prejudicial Comments," appellant presents some distinct issues as to the action of the trial court in overruling certain objections, motions to exclude or "to disregard" remarks, or motions for a mistrial interposed by defendant. We do treat each one separately.

During the first part of the direct examination of Agent Little of the Alabama Bureau of Investigation, the following occurred:

> "Q. Did you, during that time, investigate a marijuana case at Bear Point?
>
> "MR. CARLTON: Object and move to strike and ask the court to instruct the jury to disregard that.
>
> "MR. TAYLOR: And Judge, we specifically address our objection to the form of the question. 'Investigating the marijuana case.' We object to that unless there is some connection with out client as to what case he investigated.
>
> "THE COURT: Say alleged case.
>
> "MR. HENDRIX: If I don't tie it up-it doesn't matter what I say unless I hook into it. [sic]

> "MR. CARLTON: Excuse me. I object and ask the court to instruct the jury to disregard his remarks. That is not the purpose of a trial....
>
> "MR. HENDRIX: That is not what I meant. If he interpreted that way, that's not what I meant.
>
> "THE COURT: Go ahead and ask your question.
>
> "MR. HENDRIX:
>
> "Q. Do you know the Defendant, Daniel P. O'Leary?"

In support of his contention that the trial court committed error in connection with the portion of the transcript quoted above, appellant "asserts that the Trial Court erred in failing to sustain an objection to a statement made by the prosecutor that 'If I don't tie it up-it doesn't matter what I say unless I hook him to it' (emphasis original)." Appellant then "submits that the statement was made merely for the purpose of prejudicing the Defendant in the mind of the jurors." If such was the intention of the attorney for the State, it is not obvious to us. It is obvious that

the expression "hook him to it" could have conceivably had a tinge of sharpness that could have been avoided by one of the more conventional applicable expressions, such as "connect it" or "tie it up", but we are not convinced the words chosen were "merely for the purpose of prejudicing the Defendant in the minds of the jurors." Furthermore, the prompt disavowal of any intention to convey the thought that defendant's counsel deemed that the language possessed should have removed any possible sting that could have occurred. The trial court evidently so considered it by stating, "Go ahead and ask the question." Defendant seemingly saw no reason then to insist on the ruling that he invoked prior to the disavowel by counsel for the State. We find no error in the action of the trial court as to the incident.

During further direct examination of Agent Little as to what took place and what was observed as he joined other law enforce-

officers on the Island Girl on the morning of December 31, 1977, the following occurred:

"Q. Did you find a weapon on board?

"MR. TAYLOR: Objection, it's irrelevant and immaterial. It's irrelevant and immaterial to this defendant.

"MR. CARLTON: If Your Honor please, it's being brought up for the purpose of merely inflaming the jury. It has nothing to do with this charge at all or any other charge.

"THE COURT: I Overrule the objection.

"MR. HENDRIX: Did you ask the defendant if he had any weapons on board?

"MR. TAYLOR: We object.

"THE COURT: Overrule the objection.

"THE WITNESS: May I ask both of them if there was any weapons on board.

"Q. Who answered?

"A. I don't know who answered.

"Q. Did you find a weapon?

"A. Yes, sir.

"Q. What did you find?

"MR. TAYLOR: We object to it on the grounds previously stated.

"THE COURT: Overrule.

"THE WITNESS:

"A. A pistol.

"Q. Did you take it into your possession?

"A. I gave it to Deputy Howell.

"Q. And then the boat was moved around to where the sailboat was?

"A. Yes sir".

Appellant briefly argues that such "testimony had nothing to do with he charge against the Defendant and the appellant respectfully asserts that the testimony was elicited for the mere purpose of inflaming the jury." We agree with the first part of appellant's quoted argument to the extent that the evidence as to a pistol being on board standing alone had little, if any, material bearing on the issue as to defendant's guilt or innocence, but we are not persuaded that such circumstance, when considered with all of the other ramified circumstances, was subject to the general

objection. As to the second part, that the testimony was "elicited for the mere purpose of inflaming the jury," we are not in agreement, as we see little, if anything, that could be inflammatory about finding a pistol on a yacht such as the Island Girl that had been traveling up and down the intercoastal waterway almost all night, with only two men aboard. It is to be noted that the objection made is unrelated to the question otherwise raised and considered as to any violation of one's right to security against searches and seizures. We do not agree with appellant's concluding statement on the point that "Testimony of this type was condemned in Mitchell v. State, 50 Ala.App. 121, 277 So.2d 395, cert. denied, 291 Ala. 794, 271 [277] So.2d 401 [404] (1973)." The reference is to what was stated at 277 So.2d p. 400:

> "... We do not sanction the procedure pursued by the state in this case in reference to six pistols with knowledge that the death weapon had not

> been found. (emphasis original) The six pistols constituted a 'courtroom arsenal' and had no place in the trial of this case.... Had the motion to exclude been limited to all testimony relating to all pistols but the Clark pistol, it would have been reversible error to have overruled the motion."

In Mitchell, the "Clark pistol" was the pistol of the victim in the murder case involved. It was relevant to show, according to the evidence, that it was not the pistol that fired the bullet that penetrated the head of the victim and killed him. Only two shots were fired at the time of the fatal encounter. The pistol that killed the decedent was never found; the other pistols had no bearing whatever on any issue in that case. In this case there was no harmful error in overruling defendant's objections as to the evidence as to the pistol that was admitted.

During the direct examination of U. S. Customs Supervisory Patrol Officer McKnight as to his boarding the Cher on the morning

of December 31, 1977, the following occurred:

"A. We suspected that the boat was loaded with marijuana.

"MR. CARLTON: I move to exclude his answer.

"THE COURT: All right. I direct the jury to strike the witness' answers from their minds. What did you base your suspicions on? the actions of the boat?

"THE WITNESS" Yes, sir, the actions of the boat and the profile that a number of other cases had followed.

"MR. TAYLOR: We object to the profile in other cases.

"THE COURT: Overrule the objection.

"MR. CARLTON: I would at this time rule [sic] for a mistrial based on the other cases unrelated to this Defendant.

"THE COURT: All right. Just confine it to the actions of these vessels.

"MR. TAYLOR: Has Your Honor ruled?

"THE COURT: I deny your motion.

"THE WITNESS: We suspected from the boat's action-

"MR. TAYLOR: Your Honor, we object to the term 'We', we want to know about his personal reasons.

"THE COURT: I think he is trying to tell you. Overrule your objection.

"MR. TAYLOR: We except.

"THE WITNESS: Okay. I suspected the boat would possibly be loaded with marijuana on the actions and the way it came in at night and the way it had been met by another boat and led into another case area."

It is to be seen from the quoted portion of the transcript that that portion of the answer of the witness as to the "profile that a number of other cases had followed" was held in effect to be inadmissible, as found in the court's instruction to the witness, "Just confine it to the actions of these vessels." This the witness thereafter did. As to the particular matter, defendant's objection came after the witness had answered, and he did not move to exclude the objectionable part of the answer but moved for a mistrial by reason thereof. There may have been no definite meeting of the minds of the court and the defendant's counsel on the subject, but we believe it to be reasonably clear, and that it was clear to

the jury, that the objectionable part of the statement of the witness was not in evidence for consideration of the jury. Whether so or not, the incident did not give rise to a meritorious motion for a mistrial. We find no error prejudicial to defendant as to the matter.

On two occasions during the trial, the State injected into the case the matter of the authority of officers of U. S. Customs Service, one during the testimony of Supervisory Patrol Officer McKnight and the other during the testimony of Officer Moree, both officers of the U. S. Customs Service. The questions pertained to their authority to board vessels in coastal waters of the United States. Grounds of objection were to the effect that their testimony would contain opinions or conclusions of law that were for the court, and the court only, to decide. The transcript shows the following during the direct examination of Officer McKnight:

"Q. Is it a custom, do you have authority to board vessels at any time?

"MR. TAYLOR: I object. We object, that calls for a legal opinion of the person.

"THE COURT: Overrule the objection.

"MR. TAYLOR: We except.

"THE WITNESS:

"A. Yes sir, Nineteen, U. S. Code-

"MR. CARLTON: We will move to exclude the answer as being unresponsive. It's a question of law and we contend he does not have the authority to board under the circumstances as he has testified.

"THE COURT: Deny your motion.

"THE WITNESS: That is the authority and that is the reason that I boarded the vessel at that time, yes sir."

The witness thereafter proceeded to testify as to boarding the Cher and finding the marihuana thereon. We see no need to quote the more extensive part of the transcript wherein Officer Moree was questioned over the objections of defendant as to his boarding the Cher and his legal authority for doing so.

Appellant cites in support of his contention Fiorella v. City of Birmingham, 35 Ala.App. 384, 48 So.2d 761, cert. denied, 254 Ala. 515, 48 So.2d 768, cert. denied 340 U.S. 942, 71 S.Ct. 506, 95 L.Ed. 680 (1950). We do not disagree with appellant's contention as to the general inadmissibility of such evidence, but as we pointed out heretofore, this defendant had no standing to question the legality of the search and seizure made on the Cher. It may well be that the excursion by the State into the area of the legal authority of the witnesses, which was a matter for the court and not the jury to decide, was prompted to some extent by defendant's theme throughout the case to the effect that the officers had no right to board either vessel, but whether so or not we do not find reversible error in the action of the court in overruling defendant's objections to it, for the reason that it was entirely innocuous.

During the opening argument to the jury of counsel for the State, we find the following argument, objection and motion of defendant and ruling of the court:

> "He [attorney for defendant] is going to talk to you about engine trouble, and that's probably the reason she [Island Girl] was lying dead in the water out there was because of engine trouble. I don't know how long the engine trouble was going on. There is no evidence of that-Whether it had just started going on for several weeks....
>
> "MR. CARLTON: Excuse me. But I would object and move for a mistrial predicated on the statement counsel. We have no evidence of that as the defendant is under no obligation to present any evidence whatsoever. And I would make further objection, which I would like to make out of the presence of the jury.
>
> "(Pause)
>
> "MR. CARLTON: Well, the jury doesn't have to be taken out. I can come closer.
>
> "(SIDE BAR).
>
> "MR. CARLTON: Your Honor, my objection is that that statement that we have no evidence of that, referring to the engine trouble, is a comment on the failure of the defendant to testify-That if

> he had testified he could have explained how he had been having engine trouble. And I think that is a reversible error and move for a mistrial.
>
> "THE COURT: Deny the motion."

An analysis of the argument, the objection and motions of defendant, and the ruling of the court leads us to the conclusion that the principal, if not the exclusive, target of the objections and motion was the last sentence of the quoted argument, "There is no evidence of that-Whether it had just started going on for several weeks," and the contention of appellant seems to be directed chiefly, if not solely, to such sentence. In support of his contention, appellant relies upon Beecher v. State, 294 Ala. 674, 320 So.2d 727 (1975). Appellant expressly contends "That the challenged statement of the prosecutor gave rise to the distinct possibility that the jury would understand the statement as a comment on the

Defendant's failure to testify and that the trial court should have granted the motion for mistrial or attempted to cure the error by appropriate curative instructions." The statement of counsel for the State in the instant case is essentially different from the statement that was the subject of the issue determined in Beecher v. State. The statement there was, "No one took the stand to deny it." The "it" referred to an item that was in the evidence. In the instant case, there was no reference whatever to the failure of anyone to take the stand, no reference to the failure of anyone to deny or dispute any evidence that was in the case. The statement could not be interpreted as being any more critical of the defendant than of the State. It is impossible for us to say what was in the mind of counsel for the State at the time he was interrupted therein by the objection, but at that time it is clear that his

statement was subject to the only reasonable construction that the jury was being asked to take the evidence as it was, and not to speculate on what it could have been, as to the duration of the engine trouble. If defendant's counsel correctly anticipated that the State's counsel would inject the failure of any person or persons to testify as to the duration of the engine trouble, he succeeded in forestalling such improper argument, by his interruption of the argument of counsel for the State. It should be kept in mind that with the close surveillance of the Island Girl maintained by law enforcement personnel up and down the thirty-mile stretch of the intercoastal canal, some of them could have shown, if it was true, that no appreciable engine trouble of the Island Girl had been manifested, but in commendable candor, State's counsel disavows any such contention by saying, "I

don't know how long the engine trouble was going on."

Perhaps the whole matter could have been clarified by an in depth conference, which was hardly possible by the "SIDE BAR" conference that transpired, but no one is to be blamed in that respect. The trial court was not in error in denying defendant's motion for a mistrial. It would not have been appropriate, we think, for the court to have sua sponte taken any action other than it did in calmly denying defendant's motion for a mistrial. In the argument quoted, we find that there was no comment on the failure of the defendant to testify. Luker v. State, Ala.Cr.App., 358 So.2d 504 (1978).

We have searched the extraordinarily voluminous record in this case for error prejudicial to defendant and have found none. The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge LEIGH M. CLARK, serving as a judge of this Court under the provisions of Section 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court.

AFFIRMED.

All the Judges concur.

IV.

Ex Parte Daniel P. O'LEARY.

(Re Daniel P. O'LEARY

v.

State of Alabama).

80-824

Supreme Court of Alabama

November 23, 1981

Upon a preliminary examination of the petition in the above cause, the Court concludes there is a probability of merit in the petition and has today granted the writ.

IT IS, THEREFORE, ORDERED that the writ issue to the Court of Criminal Appeals and that this cause stand ready for submission on briefs or oral argument, if so desired, in accordance with Rule 39, Alabama Rules of Appellate Procedure.

PER CURIAM

FAULKNER DIVISION CONCURS

V.

Ex parte Daniel P. O'LEARY.

(Re Daniel P. O'LEARY

v.

State of Alabama).

80-824.

Supreme Court of Alabama.

May 21, 1982.

Rehearing Denied July 16, 1982.

EMBRY, Justice.

O'Leary's conviction for possession of marijuana is here for review after we issued the writ of certiorari to the Court of Criminal Appeals the second time.

That appellate court, 417 So.2d 214 initially reversed the conviction on the basis that the record did not disclose a proper arraignment. At the behest of the State, we granted certiorari to review that holding and reversed that court regarding arraignment. We remanded for further proceedings,

417 So.2d 217. On remand, the Court of Criminal Appeals decided the remaining issues adversely to defendant and affirmed his conviction. Now defendant challenges that court's latter decision.

The pertinent underlying facts are summarized in the opinion of the Court of Criminal Appeals, O'Leary v. State [Ms. June 23, 1981] 417 So.2d 219 (Ala.Cr.App. 1981), as follows:

> "The series of incidents that formed a basis for the prosecution in the instant case, as well as the prosecutions against nine other individuals, transpired during the last few days and nights of 1977, particularly but not exclusively December 30 and December 31...
>
> "....
>
> "For a few days before December 31, 1977, there had been a joint investigation, covering the area of Baldwin County surrounding the place where the marihuana was found and seized, conducted by law enforcement officers of Alabama Bureau of Investigation, United States Customs Service, Alabama Beverage Control Board and Baldwin County Sheriff's Department. It pertained to suspected unlawful activities on water and on land between Ft. Morgan, Alabama, and its environs, and

> the Alabama-Florida boundary near its southern end, and resulted in the discovery and seizure, in the early daylight hours of January 31 [sic], of the marihuana, on board a vessel that had been traced upon its entry from the Gulf of Mexico to where it had been moored and abandoned by its occupants at Bear Point Marina. The vessel was consistently referred to in the evidence as a 'sailboat' by the name of 'Cher.'
>
> "The Cher had been preceded at varying distances by a pleasure yacht by the name of 'Island Girl' from the Ft. Morgan area to the area of the Bear Point Marina. It then went only a short distance farther in a generally easterly direction and stopped without coming to land. Soon thereafter, both of the vessels were boarded by some of the law enforcement officers. Those boarding the Cher found the marihuana; those boarding the Island Girl found no marihuana or other controlled substance. On the Island Girl were the defendant (appellant) and another man. They were both arrested on the occasion. On the same occasion, persons who had landed from the Cher were arrested; soon thereafter the marihuana was discovered, and all arrested, including defendant (appellant), were transported to the Baldwin County Jail."

At a further point in the opinion, there appears a more detailed statement of the surveillance of the two vessels by law enforcement officers. It reads:

"About nine or nine-thirty P.M. December 30, 1977, the Island Girl was observed by one of the officers testifying leaving Bear Point Marina and proceeding west along the long and winding intercoastal [sic] waterway toward Ft. Morgan. It was thereafter followed by U. S. Customs Supervisory Patrol Officer Joe McKnight and A. B. C. Agent Aubrey Little, in an open fishing boat, at Gulf Shores, who maintained visual surveillance of the Island Girl by means of its running lights to a point approximately two miles east of Ft. Morgan, a total distance of about thirty miles from Bear Point Marina. Meanwhile, according to the testimony of U. S. Customs Agent Jim Moree, he and Mr. Forrest Robinson went to Mobile, obtained a U. S. Customs boat and brought it alongside Agent Little's boat, where it was boarded by S. P. O. McKnight, who commenced and maintained surveillance of Island Girl by radar on the customs boat. Also in the meantime, U. S. Customs Agent Reggie Montgomery and Officer Roland Howell of the Baldwin County Sheriff's Department paralleled largely the travel of the Island Girl and each of the boats following it by their movement on motor vehicles along the highway on the Baldwin County Peninsula between Gulf Shores and Ft. Morgan. Agent Montgomery viewed the Island Girl with binoculars from the end of the pier at the end of the peninsula at Ft. Morgan. He observed what was afterwards determined to be the Cher coming from the Gulf of Mexico.

"According to the testimony of S. P. O. McKnight, after he had commenced radar surveillance of the Island Girl he observed by radar the sailboat, af-

terwards determined to be the Cher, and noticed that it 'left our location and headed on a straight line toward the blip we had established as being the 'Island Girl.' He further testified:

"'After the light flashed, the boat moved away from where our boat was, and traveled to a point to a quarter of a mile from the position the Island Girl was in. At this time the Cher gave another flash of deck lights, turned them off, the Island Girl, after a few seconds and flashed back to the sailboat with a spot light or something. We were unable to determine what. Again the Cher turned on its deck lights and again another flash of lights from the Island Girl. At this time they both proceeded eastbound in the intercoastal [sic] back towards the Gulf Shores area.

"'MR. HENDRIX:

"'Q. Which boat was in the lead?

"'A. The Island Girl.

"'Q. Approximately how far behind the Island Girl did the Cher follow?

"'A. The Cher varied its distance anywhere from a quarter mile to half mile. Most of the time a quarter mile distance between the two.

"'Q. How far did you maintain your distance between you and Cher?

"'A. Ours also varied as to traffic conditions--light tugboat traffic in the Intercoastal [sic]. But we stayed a maximum of two miles all the time.

"'Q. Did you have them on radar at that time?

"'A. Yes, Sir.'

"On cross-examination his testimony continued as follows:

"'Q. Could you tell us, sir, when you saw the two boats meet, what do you mean by them meeting?

"'A. They came to a point one-quarter mile apart, and light signals were observed from each boat. And they simultaneously started their movements to the east, and maintained the same distance between them all the way for the entire thirty miles.

"'Q. Okay. First of all, they did not come in direct proximity with each other, did they?

"'A. They did not touch each other.

"'Q. There was a quarter of a mile between them?

"'A. Yes, sir.

"'....

"'Q. I see. Are you familiar with the position in which the Island Girl was when the Cher came to rest at some area near the Island?

"'....

"'A. The Island Girl, when the Cher went into the cut of land-Pirates Cove, the Island Girl remained in the intercoastal [sic],

> approximately a half mile to a mile from that place. It was just east of where the Cher left the intercoastal to go into that point of land. The Island Girl continued to a point just east of that and idled into the Intercoastal Canal.'"
>
> "SPO McKnight testified further that he was among those who boarded the Cher and found the bales of marihuana thereon.
>
> "Agent Aubrey Little of the Alabama Bureau of Investigation, (Public Safety) testified that he, with a deputy sheriff and an officer of U.S. Customs boarded the Island Girl soon after it was stopped as heretofore stated and saw the defendant as they boarded it, who identified himself by name and stated that he was the captain of Island Girl...."

Although defendant was neither aboard the sailing vessel "Cher," at the time of his arrest, nor when the marijuana and numerous other articles were seized from that vessel, he challenged the search and seizure as unconstitutional by way of a motion to suppress as evidence at trial all "papers, documents, vehicles, boats, controlled substances, marijuana, firearms, and any oth-

er evidence" seized. The motion was denied by the trial court.

Reviewing that action of the trial court, the Court of Criminal Appeals held:

> "....As to the suppression of that evidence, appellant is without standing. There is nothing in the record or the transcript to indicate that he owned the Cher or had any legal right to possess or control it. The only evidence as to his connection with it is that which shows his connection with the contraband it was transporting. By his plea of not guilty, he denies such a connection. His position in so doing and claiming an interest in the Cher that would entitle him to the benefit of constitutional protection against an unreasonable search and seizure of the Cher is duplicitous.... Furthermore, whatever interest he had in the marihuana, which the jury by its verdict decided that he had, would not be sufficient to show that the Cher, or that which was searched or seized on the Cher other than the marihuana, was one of his 'houses, papers, and [or] effects' as to which the Fourth Amendment to the Constitution of the United States affords security...."

Defendant asserts this ruling was error because, he contends, he was entitled to "automatic standing" under Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). The "automatic standing

rule," as enunciated in Jones, and later clarified in Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), is that a defendant has standing to test the constitutionality of a search and seizure where his indictment charges "possession of the seized evidence at the time of the contested search and seizure," 411 U.S. at 229, 93 S.Ct. at 1569, without the necessity of showing an expectation of privacy in the premises searched.

That rule was expressly overturned in United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), wherein the court remarked:

> "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched....
>
> "We are convinced that the automatic standing rule of Jones has outlived its usefulness in this Court's Fourth Amendment jurisprudence."

However, the decision in Salvucci was handed down after the conviction of defen-

dant in this case. We therefore conclude that defendant was entitled to automatic standing because he relied upon Jones. As the court in Salvucci stated, with respect to the defendants in that case:

> "This action comes to us as a challenge to a pretrial decision suppressing evidence. The respondents relied on automatic standing and did not attempt to establish that they had a legitimate expectation of privacy in the areas of . . . [the] home where the goods were seized. We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated. See Combs v. United States, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972).

We find the Court of Criminal Appeals in error when holding that defendant had no standing to challenge the warrantless search and seizure. However, this was error without injury and therefore does not require reversal. Rule 45, ARAP. This, we conclude, because that court did proceed to address the merits of the search and seizure issue in another context, when it observed:

> "It should be said also that a United States Customs officer was among the officers that boarded each of the vessels and that 19 U.S.C.A. Section 1581(a) provides:
>
> "'Any officer of the customs may at any time go aboard of any vessel or vehicle at any place in the United States or within the customs waters, or as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-11 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any persons, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.'"

The opinion of the appellate court does not contain any discussion of the numerous cases interpreting this statutory provision.

Defendant asserts that, although Section 1581(a) grants customs agents broad statutory authority to stop and search for contraband, nevertheless, the Fourth Amendment imposes a reasonableness requirement upon custom searches. United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). It has been

held that strict application of the literal terms of the above quoted statute to every vessel would "subvert the Fourth Amendment." United States v. Jones, 528 F.2d 303 (9th Cir. 1975).

It is well-settled, however, that customs officers may conduct a search of a vessel or person at the boarders of the United States or the functional equivalent of the United States borders, without a warrant, without probable cause, or even without suspicion of illegal activity. Almeida-Sanchez, supra. But, after customs agents may legitimately conduct a border standard search, there must be a "high degree of probability that a border crossing took place." United States v. Brennan, 538 F.2d 711 (5th Cir. 1976). The customs officers must be "reasonably certain" that the object of the search has just entered from a foreign county [sic]. United States v. Tilton 534 F.2d

1363 (9th Cir. 1976); United States v. Vigil, 448 F.2d 1250 (9th Cir. 1971).

Defendant contends that the "Cher" was first sighted in the intracoastal waterway, and the arresting officers had no information indicating the vessel had come from international waters. Consequently, he argues, a border standard search was improper.

Of course, on review by certiorari, we must defer to the fact findings of the Court of Criminal Appeals. Flannegin v. State, 289 Ala. 177, 266 So.2d 643 (1972). As earlier quoted, that court stated the "vessel . . . had been traced upon its entry from the Gulf of Mexico to where it had been moored and abandoned by its occupants at Bear Point Marina." It is unclear from this statement whether the "Cher" was initially spotted in international waters or in territorial waters of the United States. For reasons we will state, however, it is

not necessary to decide whether the facts of this case justified a border scenario search.

In United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979), that Court of Appeals considered Section 1581(a) in light of facts strikingly similar to those of the instant case. Because of its close factual parallels and its treatment of what we consider to be controlling principles of law, we quote from Serrano at length:

> "During a routine patrol at Tampa Bay around midnight on June 8, 1978, Customs officers spotted a shrimping vessel approximately sixty-five feet in length traveling up the shipping channel towards Tampa without required red and green navigational lights on the bow or white light on the stern. The Customs boat pulled off to the side of the channel and then followed the vessel at a distance of a half-mile to a mile. Officers utilized night vision devices to assist surveillance. The shrimping vessel left the channel and proceeded into shallow waters as it neared Apollo Beach, a residential area with a public launching facility and marina. Its range and deck lights were extinguised, and it went dead in the water. Lights were flashed between the shrimper and a smaller vessel and the two vessels approached or closed with each other. Approximately forty-five

minutes later, the shrimper returned to the shipping channel without lights. In the channel all required lights, including navigational lights, were turned on. As the vessel headed down the bay towards open waters of the Gulf of Mexico, several small boats were sighted in her immediate vicinity. Customs officers identified the vessel as the BONNIE LASS, identified themselves and boarded the vessel. A Customs officer was handed the ship's documents and questioned one of five men aboard as to whether he was the captain or the owner or master named in the documents and whether the vessel was carrying any cargo, shrimp or fish. During the conversation the officer smelled marijuana. The search which followed revealed 1,312 bales of marijuana on board.

" . . . .

"Defendants argue an unconstitutional search of the BONNIE LASS. The case was presented to the district court, and argued before this Court on appeal, as if probable cause was required in order for the boarding of the vessel to be legal. The district court found probable cause to be a close question, but held that probable cause existed for the boarding.

"Based on recent decisions by this Court, we conclude that only reasonable suspicion of illegal activity was necessary to justify the boarding. The evidence clearly meets this standard, even though the evidence might also support the denial of the motion to suppress based on the probable cause standard.
[19 U.S.C.A. Section 1581(a) here recited]

". . . Searches and seizures made pursuant to . . .[19 U.S.C.A. Section 1581(a)] must, of course, meet the general standard of reasonableness imposed by the Fourth Amendment. United States v. Freeman, 579 F.2d 942, 945 (5th Cir.1978).

"This Court has considered several Fourth Amendment attacks on Customs boardings or searches conducted in inland or internal waters, the ports, harbors, bays, river mouths, and adjacent parts of the sea inside the coastline. The cases have indicated that these bodies of water adjacent to the sea are not part of 'customs waters' but have not decided whether random Customs boarding and document checks would be constitutionally permissible in these waters. See United States v. Whitmire, 595 F.2d 1303, 1315-1316 (5th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3262 (Sept. 5, 1979, No. 79-375); United States v. Castro, 596 F.2d 674, 676 (5th Cir.1979), petition for cert. denied [444] U.S. [963], 100 S. Ct. 448, 62 L.Ed.2d 375 (1979).

"Customs boardings have been approved in inland waters where Customs officials had reasonable suspicion of a Customs violation. In United States v. Whitmire, supra, the Court assessed the constitutionality of a boarding of a boat initially sighted traveling in the intracoastal waterway but boarded only after it had reached the dock and its occupants had gone ashore. The Court held the boarding constitutional where the officers had reasonable suspicion of a Customs violation, and the boarding followed an unsatisfactory document check on shore. 595 F.2d at

1316. The Court noted that but for the fact that the boat had reached shore and defendants had disembarked, the boarding would have been justified as an 'investigatory stop' under United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); United States v. Whitmire, 595 F.2d at 1308

". . . .

"Most recently, this Court considered an inland waters Customs boarding under conditions very similar to those before us. The boarding in United States v. Castro, supra, occurred after Customs observed the boat in the intracoastal waterway heading towards open waters 20 miles away. The boarding, which occurred before the boat reached the coastline, was held constitutional based on 'sufficient articulable facts to support an inference' that the vessel was involved in smuggling contraband.

"We therefore conclude that Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. Section 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband. See United States v. Rivera, 595 F.2d 1095, 1098 n. 4 (5th Cir. 1979).

". . . .

"Brignoni-Prince includes as factors to be considered in assessing reasonable suspicion, proximity to the

> border, usual traffic patterns in the area, recent illegal traffic, the driver's behavior and aspects of the vehicle's appearance. 422 U.S. at 884-885, 95 S.Ct. 2574."

Following a restatement of the facts earlier set out, the court concluded:

> ". . . These observations and the rational inferences they engender reasonably warranted the Customs officers' suspicion that the BONNIE LASS was engaged in illegal smuggling activities. The stop and boarding therefore withstand defendants' constitutional challenge."

The holding in Serrano was recently reaffirmed in United States v. Ruano, 647 F.2d 577 (5th Cir. 1981, as follows:

> "The sole issue on this appeal is whether the customs agents possessed sufficient suspicion to stop appellants' vessel. United States Customs officials may make investigatory stops of vessels on inland waters 'on facts which justify a reasonable suspicion of illegal activity.' United States v. Serrano, 607 F.2d 1145, 1148 (5th Cir. 1979), cert. denied, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980). This interpretation does not offend the fourth amendment. United States v. Castro, 596 F.2d 674 (5th Cir.) cert. denied, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979).

> "A customs officer testified that he stopped appellants' vessel because of the vessel's 'high rate of speed,' the early hour of the morning, the fact that the vessels appeared to be travelling together, and the fact that only one individual appeared on each boat which was 'inconsistent with people going out fishing.' He further testified that the boats were violating the common courtesy usually given to other vessels by slowing down when entering Government Cut.
>
> "Under the relaxed standard announced in Serrano, we find that these facts constituted reasonable suspicion to justify an investigatory stop. . . . [Footnotes omitted]

In light of the "relaxed standard" of reasonable suspicion of illegal activity justifying searches conducted pursuant to 19 U.S.C.A. Section 1581(a), as delineated in Serrano and Ruano, applied to the facts stated by the Court of Criminal Appeals, the conclusion is supported that a reasonable suspicion existed of illegal activity taking place about the vessels. This justified the law enforcement officers, which included U. S. Customs Officers, searching those vessels and seizing therefrom contraband and

other articles without violating constitutional restraints imposed upon searches and seizures.

Having resolved the search and seizure issues, we turn to defendant's contention that the Court of Criminal Appeals erred when it failed to reverse the trial court's ruling denying his motion for a new trial, based on false answers given by the jury foreman during the voir dire examination of prospective jurors.

This issue was not addressed in the opinion of the Court of Criminal Appeals, although petitioner had argued it in his brief to that court. The issue was properly brought before this court, however, by petitioner's additional or corrected statement of facts pursuant to ARAP 39(k). Bankston v. State, 358 So.2d 1040 (Ala.1978).

During the voir dire examination, defendant's attorney asked each juror about his or her jury duty experience, to which

Mr. Morgan Odom, eventually selected as foreman of the jury, responded.

> "I was summoned twice, but never served."

Several months after defendant's conviction, a question arose as to whether defendant had been properly arraigned for trial. In connection with the arraignment issue, defendant filed a motion to correct or modify the record. At a hearing on that motion, several witnesses, including Odom, were called to testify concerning the events which transpired on the morning of the arraignment.

After specifically testifying that he had served on the jury for the defendant's trial in July of 1978, Odom was cross-examined by defendant's attorney, during which the following exchanges occurred.

> "Q Mr. Odom, how many times have you been on a jury?
>
> "A About four times to the best of my knowledge.

"Q. How many times have you been on a criminal jury like the one in July last year?

"A I was on the July one last year, and I was on the marijuana one of the year before that.

"Q And that would have been in 1977?

"A Yes, sir.

". . . .

"Q Do you recall anything else happening that morning?

"A Mostly routine. It was kind of a funny way of striking a jury. I just never seen one struck like that.
"All the questions that were asked. This and that, trying to prolong the court, looked to me like that.

". . . .

"Q Do you remember anything about me saying something about wanting a continuance and one of my partners was in Washington at the United States Supreme court asking for a continuance?

"A You asked for a continuance or you heard from one and you didn't get it, so they all prolonged waiting on your call or something.
"All these questions that lasted half a day, to me it seemed like it was just prolonging the trial and stalling for time. That's my personal opinion.

". . . .

"Q Were you the foreman of the jury?

"A Yes, sir.

"Q How many times have you been foreman of a jury?

"A That's the second time I have been foreman."

Although defendant's attorney did not ascertain, by his questions, whether the four occasions of Odom's jury service occurred prior to or after the trial of defendant in this case, it is evident from the quoted responses of Odom that he had served on a jury at least once prior to defendant's conviction and, significantly, in a "marijuana case." It is further made clear that defendant's trial was the second occasion on which Odom had served as jury foreman.

Parties have a right to have questions answered truthfully by prospective jurors to enable them to exercise their discretion wisely in exercising their peremptory strikes. Coalite, Inc. v. Weeks, 284 Ala. 219, 224 So.2d 251 (1969); Little v. State, 339 So.2d 1071 (Ala.Cr.App.1976), cert. denied, 339 So.2d 1073 (Ala.1976).

However, "the failure of a juror to make a proper response to a question regarding his qualifications to serve as a juror, regardless of the situation or circumstances, does not automatically entitle one to a new trial." Beauregard v. State, 372 So.2d 37 (Ala.Cr.App.1979); Radney v. State, 342 So.2d 942 (Ala.Cr.App.1976), cert. denied, 342 So.2d 947 (Ala.1976).

Some cases have held that "[t]he proper inquiry in such cases is whether the defendant's rights were prejudiced by such failure to respond properly." Radney, supra; Sheperd v. State, 57 Ala.App.35, 325 So.2d 551 (1975). To be more correct, however, "[t]he test is not whether the defendant was prejudiced but whether he might have been." Beauregard v. State, supra.

It is axiomatic, however, that a party seeking reversal on appeal must not only argue a valid ground of reversible error committed below, but must also have preserved

that error for review by proper procedural mechanisms.

At the trial level, defendant raised the discrepancy in Odom's answers by way of oral renewal, based on newly discovered evidence, of his earlier written motion for new trial. The oral renewal was made more than 30 days after judgment was entered on defendant's conviction, even though the original motion for new trial was filed within 30 days of conviction.

The 30-day period statutory period for filing a motion for new trial is jurisdictional. Code 1975 Section 15-17-5; Nikens v. State, 31 Ala.App. 297, 15 So.2d 633 (1943).

Where a motion for new trial filed within 30 days of a judgment of conviction does not contain a ground relative to newly discovered evidence, a defendant is not in a position to make an assertion regarding newly discovered evidence by motion for new

trial after expiration of the 30-day period, even though the new evidence could not have been discovered until after that time period had elapsed. The trial court therefore acted correctly in denying defendant's motion for new trial as orally renewed. It is apparent this is the reason the appellate court did not address this issue. The oral motion to renew was both ineffective and, more important, too late.

Defendant also raises issues challenging the manner in which the jury was summoned, impaneled and qualified, the introduction as evidence of certain nautical charts seized by the arresting officers, and jury charges given by the trial court relative to the law of conspiracy. Upon careful review of the Court of Criminal Appeals' opinion, we find no error in that court's treatment of these issues, and refer the reader to the language of that opinion for elaboration.

For the reasons stated, the judgment of the Court of Criminal Appeals is affirmed according to the terms of this opinion.

AFFIRMED.

TORBERT, C. J., and MADDOX, FAULKNER, ALMON, SHORES, BEATTY and ADAMS, J. J. concur.

JONES, J., not sitting.

ON APPLICATION FOR REHEARING

EMBRY, Justice.

A consideration of this case for the second time by this court resulted in our opinion of 21 May 1982. In it, this court made a statement concerning our scope of review of decisions of the Court of Criminal Appeals. That statement in pertinent part is as follows:

> "Of course, on review by certiorari, we must defer to the fact findings of the Court of Criminal Appeals. Flannigan v. State, 289, 177, 266 So.2d 643 (1972). . . ."

On application for rehearing, petitioner contends this court erred when it did not consider his rule 39(k) statement for additional or corrected facts, amending those set out in the opinion of the appellate court, and misstated the rule regarding our scope of review of decisions of that appellate court. This is evidenced by petitioner's challenge of our quote from Flannagin.

Under Rule 39(k), ARAP, if a petitioner wishes, he may on an application for rehearing to the appellate court, present a statement of additional, or claimed corrected, facts for that court's consideration. If the request is denied petitioner may include, in the petition for certiorari filed with this court, that statement and "it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct" (Emphasis added.)

A careful review of our opinion in this case demonstrates that petitioner's 39(k) statement was (Emphasis original) considered when we addressed the issue of whether the appellate court erred when it failed to reverse the trial court's ruling that denied defendant's motion for new trial based on false answers given by the jury foreman during voir dire examination of prospective jurors. Petitioner could have readily determined that this 39(k) statement was not overlooked if he had carefully reviewed the record, together with his 39(k) statement. We did so, without difficulty, and concluded that the "false answers" issue petitioner says the appellate court did not address, in fact, was not addressed by it.

However, petitioner correctly asserts that we erred in our statement regarding this court's scope of review in appeals structured on a record, framed as is the one in this particular case. We note that

Flannigan, in its applicability to our scope of review by certiorari, is applicable to this case to the extent those issues raised by petitioner's 39(k) statement were found to be incorrect and without merit. To the extent the one issue in that statement was meritorious, we hereby clarify our opinion and state that our scope of review is not limited only to the facts found in the appellate court's opinion, but also includes consideration of petitioner's additional, or claimed corrected, statement of facts. Rule 39(k), ARAP.

As we again review the record in this case, and again consider petitioner's 39(k) statement, we find no new issues or facts not carefully considered or correctly disposed of either by this court or the appellate court.

OPINION EXTENDED; APPLICATION FOR REHEARING OVERRULED.

TORBERT, C.J., and FAULKNER, ALMON, SHORES, BEATY and ADAMS, JJ. concur.

VI. Amendments IV, V, VI, XIV to the United States Constitution.

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person shall . . .be deprived of life, liberty or property, without due process of law."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a impartial jury of the state and district wherein the crime shall have been committed. . . ."

Amendment XIV:

". . .nor shall any state deprive any person of life, liberty, or property, without due process of law; nor denied to any person within its jurisdiction the equal protection of the laws."

VII. Text of New Jury Act, Act 594, Code of Alabama 1975, 12-16-1, et. seq.

Act No. 594, 1978 Regular Session (New jury law) now codified as Code of Alabama, 1975, Volume 11-Pocket part Section 12-16-2:

ALABAMA LAW

(Regular Sessions, 1978)

Act. No. 594 H. 308--White, Manley, Gafford, Harris, Barron, Roberts, Folmar, Johnstone, Hill, Jackson (R), Leonard, Crowe, Robertson, Lutz, Kennedy, Warren

AN ACT

To provide for the qualifications and selection of jurors; to provide for a master list, master jury box and trial court box; to provide for qualification forms and the questionnaires to be used thereon; and to repeal Sections 12-16-2, 12-16-4, 12-16-5, 12-16-39, 12-16-41, 12-16-42, and 12-16-43 of the Code of Alabama 1975.

Be it Enacted by the Legislature of Alabama:

Section 1. (Codified as Section 12-16-55--Pocket part) Declaration of Policy. It is the policy of this state that all persons selected for jury service be selected at random from a cross section of the population of the area served by the court and that all qualified citizens have the opportunity in accordance with this act to be considered

for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

Section 2. (Codified as Section 12-16-56--Pocket part) Prohibition of Discrimination. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

Section 3. (Codified as Section 12-16-57--Pocket part) Master List. (a) The jury commission for each county shall compile and maintain an alphabetical master list of all persons in the county who may be called for jury duty, with their addresses and any other necessary identifying information. This list may include all registered voters, persons holding drivers licenses and registering motor vehicles, and may include other lists, such as lists of utility customers and persons listing property for ad valorem taxation, which will include persons whose listing will foster the policy and protect the rights provided in Section 1 and 2 hereof.

The list shall avoid duplication of names. The list shall be reviewed and corrected and new names added from time to time but a least every four years.

(b) Whoever has custody, possession or control of any lists used in compiling the master list shall make the list available to the jury commission for inspection, reproduction, and copying at all reasonable times.

(c) The master list shall be open to the public for inspection at all reasonable times.

Section 4. (Codified as Section 12-16-58--Pocket part) Master Jury Box. (a) The name of every person on the master list shall be set forth on a card listing the name or identifying number as a prospective juror, and the cards shall be placed in the master jury box as provided in this section.

(b) The number of prospective jurors to be placed in the master jury box shall be 1,000 plus one percent of the total number of names on the master list. From time to time additional prospective jurors may be place in the master jury box as determined by the jury commission or ordered by the circuit court. In July of each even numbered year, the master jury box shall be emptied and refilled as herein prescribed.

(c) The names of identifying numbers of prospective jurors to be placed in the master jury box shall be selected by the jury commission at random from the master list as follows:

The total number of names on the master list shall be divided by the number of names to be placed in the master jury box and the whole number next greater than the quotient shall be the "key number," except that the key number shall never be less than two. A "starting number" for making the selection shall then be determined by a random method from the numbers one to the key number, both inclusive. The required number of the names shall then be selected from the master list corresponding to the starting number and then successively the names appearing on the master list at intervals equal to the key number, recommencing if necessary at the start of the list until the required number of names has been selected. Upon recommencing at the start of the list, or if additional names are subsequently to be se-

lected for the master jury box, names previously selected from the master list shall be disregarded in selecting additional names.

Section 5. (Codified as Section 12-16-59--Pocket part) Drawings from master jury box and completion of juror qualification forms. (a) From time to time and in a manner prescribed by the circuit court, the jury commission shall publicly draw at random from the master jury box the names or identifying numbers of as many prospective jurors as the court orders. Neither the names drawn nor any list thereof shall be disclosed to any person other than pursuant to this act or specific order of the court. The jury commission shall mail to every prospective juror whose name is drawn from the master jury box a juror qualification form accompanied by instructions to fill out and return the form to the jury commission within 10 days after its receipt.

(b) The juror qualification form shall be prepared by the Supreme Court of Alabama and shall elicit the name, age and address of the prospective juror, and whether or not the prospective juror:

(1) Is a citizen of the United States;

(2) has been a resident of the county for twelve months;

(3) is able to read, speak, understand and follow instructions given by a judge in the English language;

(4) has lost the right to vote by conviction of any offense involving moral turpitude.

(c) The juror qualification form shall contain the prospective juror's declaration

that the responses are true to the best of the knowledge of the juror. If the prospective juror is unable to fill out the form, another person may do so for the juror, and shall indicate on the form who filled it out and the reason therefor.

(d) If there is an omission, ambiguity or error in a returned form, the commission shall again send a form to the prospective juror with instructions to make the necessary additions, clarification or correction and return the form within 10 days of its receipt.

(e) In the event any prospective juror fails to return a completed juror qualification form as instructed by the commission, the commission shall notify the prospective juror to appear forthwith before the commission to fill out properly the juror qualification form. At the time of the appearance of the juror before the commission, the juror may be required to fill out another form, and may be questioned with regard to the responses to the questions contained on the form and the grounds for excuses or disqualifications. Any information thus acquired shall be noted on the form.

(f) In the event any prospective juror fails to return a completed juror qualification form as instructed by the commission, the name of such prospective juror may be certified to the court to appear and show cause for such failure. If the prospective juror fails to appear pursuant to the court's order, or fails to show good cause for failure to follow instructions of the commission, such prospective juror shall be guilty of criminal contempt of court, and upon conviction shall be punished accordingly.

(g) Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of securing or avoiding service as a juror shall be guilty of a misdemeanor, and upon conviction therefor, shall be punished accordingly.

Section 6. (Codified as Section 12-16-60--Pocket part) Qualification for Jurors. (a) A prospective juror is qualified to serve on a jury if the juror is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment and also:

(1) Is a citizen of the United States and a resident of the county for more than 12 months, over the age of 19 years;

(2) Is able to read, speak, understand, and follow instructions given by a judge in the English language;

(3) Is capable by reason of physical and mental ability to render satisfactory jury service, and is not afflicted with any permanent disease or physical weakness whereby the juror is unfit to discharge the duties of a juror;

(4) Has not lost the right to vote by conviction for any offense involving moral turpitude.

(b) The jury commission shall determine on the basis of information provided on the jury qualification form, or interviews with the prospective juror or other competent evidence:

(1) If the prospective juror is qualified. If so, the name or identifying number of the juror shall be placed in the trial court jury box.

(2) If not, the commission shall notify the prospective juror of its decision and certify the juror's name to the court as disqualified. The juror shall have 10 days within which to appear before the court to review such decision. If the court finds such juror to be qualified, the court shall so certify to the commission. If the juror fails to appear, or the court finds such juror not qualified, the court shall so certify to the commission.

(c) In any event, the jury commission shall enter on the master list the ultimate determination of the qualification of each juror.

Section 7. (Codified as Section 12-16-61--Pocket part) Trial Court Jury Box. The jury commission shall maintain a trial court jury box and shall place therein the name or identifying numbers of all prospective jurors drawn from the master jury box who are not disqualified from which grand juries and petit juries are drawn as provided by law.

Section 8. (Codified as Section 12-16-62--Pocket part) Exemptions. No qualified prospective juror is exempt from jury service.

Section 9. (Codified as Section 12-16-63--Pocket part) Excuses for jury service. (a) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service. The jury commission shall enter this determination on the juror qualification form and master list.

(b) A person who is not qualified for jury service (Section 8) may be excused from jury service by the court only upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary, at the conclusion of which the person may be directed to reappear for jury service in accordance with the court's direction.

Section 10. (Codified as Section 12-16-64--Pocket part) Preservation of Records. All records and papers compiled and maintained by the jury commission in connection with the selection and service of jurors shall be preserved by the jury commission for 4 years after the master jury box used in their selection is emptied and refilled and for any longer period ordered by the court.

Section 11. Repeal of specific sections of Code. Sections 12-16-2, 12-16-4, 12-16-5, 12-16-39, 12-16-41, 12-16-42, and 12-16-43 of the Code of Alabama 1975 are hereby expressly repealed.

Section 12. (General Provision) General Repeal Section. All laws and parts of laws in conflict with the provisions of this act are to the extent of such conflict hereby repealed.

Section 13. (General Provision) Severability. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 14. (General Provision) Effective Date. This act shall become effec-

tive immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved April 27, 1978

Time: 4:30 P.M.

VIII. Text of 19 U.S.C. 1581:

"Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-11 of this title, or at any other authorized place, without as well as within his district and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

CERTIFICATE OF SERVICE

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing a copy of the petition to the Attorney General of the State of Alabama, by certified mail, return receipt requested, first-class postage prepaid, addressed to The Honorable J. Anthony McLain, Assistant Attorney General of the State of Alabama, and that an additional copy has been served pursuant to Rule 28.4(b) upon the Solicitor General, Department of Justice, Washington, D.C. 20530, on the date indicated below.

Done this 22nd day of September, 1982, by depositing the same in the United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk

and parties indicated hereinabove on this date.

CERTIFICATE OF FILING

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required by Rule 19 of the Supreme Court Rules to be filed, to-wit, an original and forty (40) copies, with the Clerk of the United States Supreme Court, were placed by me in the United States Mail, certified, return receipt requested, first-class postage prepaid, addressed to The Honorable Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19

of the Supreme Court Rules, on the date indicated below.

W. KENNETH GIBSON
Attorney for Petitioner

Sworn to and subscribed
before me on this the
14th day of September, 1982.

NOTARY PUBLIC

My Commission Expires December 5, 19[illegible]

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Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1981

No. 82-643

DANIEL P. O 'LEARY,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. GRADDICK
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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER THE BOARDING OF THE VESSELS IN QUESTION BY THE CUSTOMS OFFICERS WAS PROPER UNDER 19 U.S.C. §1581?

II.

WHETHER SECTION 19 U.S.C. §1581 IS CONSTITUTIONAL?

III.

WHETHER THE OPINION OF THE STATE COURT NOW IN QUESTION BY THE PETITIONER IGNORES THE MANDATES OF UNITED STATES V. SALVUCCI?

IV.

WHETHER A DEFENDANT IN A CRIMINAL PROSECUTION IS CONSTITUTIONALLY ENTITLED TO A JURY OR VENIRE WHICH IS A PERFECT MIRROR OF THE COMMUNITY?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CASES ii

REPORTS OF OPINIONS BELOW 1

ARGUMENT

I. THE BOARDING OF THE VESSELS IN QUESTION BY THE CUSTOMS OFFICERS WAS PROPER UNDER 19 U.S.C. §1581. 2

II. SECTION 19 U.S.C. § 1581 IS CONSTITUTIONAL. 5

III. THE OPINION OF THE STATE COURT NOW QUESTIONED BY THE PETITIONER DOES NOT IGNORE THE MANDATES OF UNITED STATES V. SALVUCCI. 6

IV. A DEFENDANT IN A CRIMINAL PROSECUTION IS NOT CONSTITUTIONALLY ENTITLED TO A JURY ROLE OR VENIRE WHICH IS A PERFECT MIRROR OF THE COMMUNITY. 8

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF CASES

Oyarzun v. Pittman, 367 So. 2d 574 (Ala. Cr. App. 1978), cert den. 367 So.2d 584 (Ala. 1979). 8

Swain v. United States, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759. 9

United States v. Ruano, 647 F. 2d 577, 579 (5th Cir. 1981). 4

United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L. Ed 619 (1980). 6

United States v. Serrano, 607 F. 2d 1145, 1148 (5th Cir. 1979). 3

Unites States v. Williams, 617 F. 2d 1063, 1088 n. 30(5th Cir. 1980). 4

19 U.S.C. §1581. 2

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Contrary to the petitioner's statement in this regard, the opinions delivered in the courts below have been officially reported as follows:

O'Leary v. State, 417 So.2d 214, (Ct. Cr. App. May 6, 1980), reversed 417 So.2d 217 (Ala. S. Ct. January 9, 1981), on remand 417 So.2d 219 (Ct. Cr. App. June 23, 1981), affirmed 417 So. 2d 232 (Ala. S.Ct. May 21, 1981), rehearing denied 417 So.2d 241 (Ala. S.Ct. July 16, 1982).

These opinions are included in petitioner's appendix to his petition, with the exception of the decisions rendered May 6, 1980, and January 9, 1981.

ARGUMENT

I.

THE BOARDING OF THE VESSELS IN QUESTION BY THE CUSTOMS OFFICERS WAS PROPER UNDER 19 U.S.C. §1581.

The petitioner contends that the facts of this case failed to establish articulable facts upon which the boarding of the vessels in question could be made by customs officers under the above-cited statute. The facts of this case are fully set forth in the Alabama Supreme Court opinion issued in this case and found at pages 68-97 of petitioner's appendix to Petition for Writ of Certiorari. The respondent would submit that these facts sufficiently establish that the customs officers possessed sufficient information to justify boarding the vessels in question under the authority of 19 U.S.C. §1581.

The interpretation of this provision by the Fifth Circuit Court of Appeals is found

in the case of United States v. Serrano, 607 F. 2d 1145, 1148 (5th Cir. 1979):

> "...customs officers may make an investigation stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C. §1581 (a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband. See United States, v. Rivera, 595 F.2d 1095, 1098 n. 4 (5th Cir. 1979).

The facts as recitedby the Alabama Supreme Court show that there were sufficient facts justifying the boarding of the vessel by customs officers. The petitioner has cited no cases which in any way negate the justification of the facts of this case when viewed in light of 19 U.S.C. §1581 and the case law relative thereto. The respondent would argue that rather than there having been a limited application of this authorization of customs officers to board vessels, the standard set forth in Serrano, supra, has been reaffirmed

in the case of United States v. Ruano, 647 F. 2d 577, 579 (5th Cir. 1981). And the standard has found further extension by a holding that factors that support a customs search without suspicion in territorial waters would also permit customs searches within the contiguous zone when less cause than reasonable suspicion existed. United States v. Williams, 617 F. 2d 1063, 1088 n. 30 (5th Cir. 1980).

The facts in the case at bar support more than a generalized suspicion and speculation on behalf of the officers who boarded the vessels in question. The case law supports the findings of the Alabama Courts that the boarding by the officers pursuant to 19 U.S.C. §1581 was proper.

II.

SECTION 19 U.S.C. SECTION 1581 IS CONSTITUTIONAL.

The petitioner makes a general argument without the support of any case law, that 19 U.S.C. §1591 is unconstitutional. The argument of the petitioner is grounded in an assertion that the statute failed to impose geographical limits or restaints on the expansive language of the statute itself. The respondent would submit that the stautue itself satisfies the Fourth amendment requirement. The respondent would also urge adoption by the Court of the theory that the governments's interest in enforcing its laws be balanced against the individual's interests in his dignity and privacy and find that the provisions of this statute are constitutional. United States v. Williams, supra.

III.

THE OPINION OF THE STATE COURT NOW QUESTIONED BY THE PETITIONER DOES NOT IGNORE THE MANDATES OF UNITED STATES V. SALVUCCI, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).

The argument of the petitioner alleges that the State Court's switch from "no standing" to "error without injury" totally ignores the mandate of Salvucci, supra. The respondent would submit that a close reading of the Supreme Court of Alabama opinion found at pages 68-97 of the petitioner's appendix to Petition for Writ of Certiorari, takes into consideration the findings of this Honorable Court in the Salvucci, supra, case. Rather than ignoring the standard of Salvucci, supra, as wrongfully contended by the petitioner, the Alabama Supreme Court addressed the facts of this case in light of the Salvucci, supra, holding and found that the defendant was entitled to automatic standing but that the facts of the case did not support

any finding of injury to the petitioner's rights which would require reversal.

The respondent would therefore submit that the petitioner's argument that the Alabama Courts disregarded the Salvucci holding of this Court is without merit. In addition to this fact, the respondent would again rely upon the facts and cases set forth in part one of this argument to substantiate its proposition that the seach and seizure conducted in this case was proper. Again, petitioner has cited no case which would support a finding of unreasonableness with regard to the facts of the case at bar.

IV.

A DEFENDANT IN A CRIMINAL PROSECUTION IS NOT CONSTITUTIONALLY ENTITLED TO A JURY ROLE OR VENIRE WHICH IS A PERFECT MIRROR OF THE COMMUNITY.

The petitioner contends that the venire drawn at the trial of his case was improperly drawn and should therefore have been quashed. The jury selection system employed in Baldwin County, Alabama, was fully addressed by the Alabama Court of Criminal Appeals in the case of Oyarzun v. Pittman, 367 So. 2d 574 (Ala. Cr. App. 1978), cert den. 367 So.2d 584, (Ala. 1979). In that case the Alabama Court of Criminal Appeals found that the jury commission of Baldwin County had substantially complied with the provision of the new statute in Alabama dealing with jury composition.

The respondent would submit that the petitioner has cited no cases in support of his argument that this finding of the Alabama

court was improper. The facts substantiate the Alabama Court's finding that the authorities of Baldwin County had taken reasonable steps to insure compliance with Alabama law. The respondent would submit that neither the jury roll nor the venire need to be a perfect mirror of the community or accurately reflect the proportionate strenght of every identifiable group. Swain v. United States, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759. The respondent contends that the petitioner failed to carry that burden of proof necessary to establish that the venire from which he was required to select a jury for the trial was unconstitutionally drawn. As stated in Swain, supra, an imperfect system is not equivalent to purposeful discrimination. Petitioner has shown nothing which would be construed as an intentional systematic exclusion of any type of class of people from the jury roll of Baldwin County, Alabama. Nor has the petitioner shown any

cases or facts which would support his allegations that the courts of Alabama improperly denied his motion to quash the jury venire as it appeared in the trial of his case.

The respondent would contend that the holdings of the Alabama courts concerning the jury composition as found in Baldwin County, Alabama, at the time of the trial of this case are proper and comport with the constitutional safeguards as espoused by the opinions of this Honorable Court.

CONCLUSION

The respondent submits that the search and seizure conducted by the Customs Officers was proper under 19 U.S.C. §1581. The courts of Alabama properly applied cases decided by this Honorable Court in making a determination that the constitutional rights of the petitioner were not violated by the search and seizure. The respondent would argue that the provisions of 19 U.S.C. §1581 are constitutional and in no way violate the Fourth amendment rights of this petitioner, as 19 U.S.C. §1581 as been construed and limited by the doctrine of reasonableness as set forth in the case law of both the Fifth Circuit Court of Appeals and the United States Supreme Court.

The respondent would finally argue that the drawing and composition of the jury venire employed in the trial of this petitioner was proper under the laws of the State of Alabama

The petitioner has shown no fact of reversal nor any case which would support an argument that the jury commission had failed to comply with the laws of the State of Alabama thereby denying the petitioner his Constitutional right to a trial by jury.

For the foregoing reasons the respondent would request that the petitioner's Petition for a Writ of Certiorari to the Supreme Court of Alabama be denied.

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, respondent, do hereby certify that on this ___ day of November, 1982, I did serve a requisite number of copies of the foregoing on the attorney for the petitioner by mailing same to him, first class postage prepaid and addressed as follows:

W. Kenneth Gibson
P. O. Box 471
Fairhope, AL 35633

_____
J. Anthony McLain
Special Assistant Attorney General

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